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N. 2995

No. 14719

United States
Court of Appeals
For the Ninth Circuit.

AUSTIN J. SHELTON,

Appellant,

vs.

GUAM SERVICE GAMES, a Co-Partnership,

Appellee.

Transcript of Record

Appeal from the District Court, District of Guam
Territory of Guam.

FILED
JUL 11 1955

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—5-27-55

PAUL P. O'BRIEN, CLERK

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NAMES AND ADDRESSES OF ATTORNEYS

For the Appellant:

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613 Wilshire Blvd.,
Santa Monica, Calif.

TURNER & STEVENS,

Aflague Bldg.,
Agana, Guam.

For the Appellee:

ROBERT E. DUFFY, ESQ.,

Duenas Bldg.,
Agana, Guam.

District Court of Guam
Territory of Guam, Marianas Islands

Civil Case No. 47-54

GUAM SERVICE GAMES, a Co-Partnership,

Plaintiff,

vs.

AUSTIN J. SHELTON,

Defendant.

COMPLAINT FOR SPECIFIC PERFORMANCE AND DAMAGES

Plaintiff complains of the Defendant and alleges:

1. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Two Thousand ($2,000.00) Dollars.

2. On or about the 1st day of February, 1954, the Plaintiff entered into a written Agreement with Defendant, a copy of which Agreement is hereto annexed as Exhibit "A," and made a part of this Complaint as though set forth at length herein.

3. That on or about 9 February, 1954, Defendant executed and delivered to Plaintiff a certain written Assignment, supplemental to the Agreement dated 1 February, 1954, hereinabove described, a copy of which Assignment is hereto annexed as Exhibit "B," and made a part hereof as though set forth at length herein.

4. That on or about 9 February, 1954, Plaintiff

executed and delivered to Defendant its Promissory Note in the principal sum of Thirty Thousand ($30,000) Dollars, payable in monthly installments of Five Thousand ($5,000.00) Dollars each, a copy of said Promissory Note being hereto annexed as Exhibit "C," and made a part hereof as though set forth at length herein.

5. Plaintiff has, in all respects, complied with the terms of the said Agreement, Assignment and Promissory Note, and is entitled to specific performance of said Agreement by the Defendant.

6. Defendant has violated the terms of the said Agreement in that he has, subsequent to the execution thereof, engaged in the coin operated machines business in the Territory of Guam, other than as an employee of the Plaintiff, and now continues to engage in such business other than as an employee of the Plaintiff herein, to the damage of the Plaintiff in the sum of Fifty Thousand ($50,000.00) Dollars.

7. That Defendant, in violation of the terms of the said Agreement, has interfered with the business of the Plaintiff, in that he has attempted to discourage customers of the Plaintiff from dealing with the Plaintiff, and has represented himself to customers of the Plaintiff as being entitled to engage in the coin operated machines business, and has attempted to sell or rent coin operated machines to customers of the Plaintiff, and continues to so violate the terms of said written Agreement, to the further damage of the Plaintiff in the sum of Fifty Thousand ($50,000.00) Dollars.

Whereas, Plaintiff prays:

1. That Defendant be required specifically to perform the said written Agreement and that he, his agents and servants be enjoined during the pendency of this action, and permanently, from in any manner or form, whatsoever, egaging in the coin operated machines business, other than as an employee of the Plaintiff.

2. That Defendant be required to pay to Plaintiff the sum of One Hundred Thousand ($100,000.00) Dollars for damages Plaintiff has sustained in consequence of Defendant's violations of said Agreement.

3. That Defendant be required to account for and pay to Plaintiff all gains and profits derived by him from the coin operated machines business subsequent to 1 February, 1954.

4. That Defendant be required to deliver up to be impounded during the pendency of this action all coin operated machines in his possession or under his control and that he be required to deliver up, to be impounded during the pendency of this action, all contracts for the purchase or importation into the Territory of Guam of coin operated machines that said Defendant has in his possession or under his control.

5. That Defendant pay to Plaintiff the costs of this action and reasonable attorneys fees to be allowed to the Plaintiff by the Court.

6. That Plaintiff have such other and further relief as to the Court shall seem just.

Dated this 22nd day of July, 1954.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

(Copy)

EXHIBIT "A"

Agreement

This Agreement, made and entered into this 1st day of February, 1954, by and between August J. Shelton, of Guam, dba Flamingo Music and Novelty Company, hereinafter called Seller, and Guam Service Games, a partnership registered under the laws of the Territory of Guam, hereinafter called Buyer.

Witnesseth:

That for and in consideration of the mutual promises and undertakings herein set forth, It Is Hereby Agreed by and between the parties as follows:

1. Seller hereby sells, transfers and assigns unto Buyer all of his right, title and interest in and to his Coin Operated Machine business in the Territory of Guam, including all equipment, inventory, supplies, contracts, routes and locations, including the following:

21 Seeburg Phonographs
29 Pinball Machines
5 Skee-Alleys

8 Six-Player Bowling Machines
1 Rio Bingo Machine
6 Electric Guns
1 1950 Chevrolet
1 1952 ½-ton pickup truck, Studebaker,

together with miscellaneous parts for the above-named equipment, furniture and office equipment presently owned and used by Seller. It is further agreed that Seller has to his credit, as of the date of this Agreement, accounts receivable in the amount of approximately Six Thousand Five Hundred ($6,500) Dollars and certain contracts at various location owners amounting to approximately Eight Thousand Five Hundred ($8,500) Dollars in total value. It is agreed that these accounts receivable and contracts shall pass to the Buyer under this Agreement, or to his assignees, successors, and transferees, forever.

2. Buyer agrees to pay therefor the sum of Fifty Thousand ($50,000) Dollars, payable as follows: Twenty Thousand ($20,000) Dollars down, receipt whereof is hereby acknowledged, and the balance payable at the rate of Five Thousand ($5,000) Dollars per month until fully paid.

3. Seller hereby covenants that he is the true and lawful owner of said property hereinabove sold and transferred, and that the same is free and clear of any and all claims and demands whatsoever, and that he, his heirs, executors, or administrators will at all times hereafter keep and save harmless and indemnify Buyer, his assignees, successors or trans-

ferees from any and all such claims or demands whatsoever.

4. Seller covenants and agrees to execute all documents, instruments and papers as may become necessary to effectuate the transfer unto Buyer of all equipment, vehicles, contracts and assets herein transferred and sold.

5. Seller hereby covenants and agrees that he will not, within the Territory of Guam, for a period of five (5) years from the date hereof, engage in the coin operated machines business, in any manner or form, whatsoever, whether as owner, partner, agent, employee or otherwise, except as an employee of the Buyer herein. It is further agreed that if the Buyer consents to hire the Seller as an agent or employee then said Buyer will offer to the Seller, as salary, the going normal wage usually paid to persons engaged in similar type of work in the Territory of Guam, at the time of the hiring of the employee; Seller further covenants that he will not interfere, directly or indirectly, in any manner or form with the business of Buyer, his assignees, successors or transferees.

In Witness Whereof, the parties hereto have hereunto affixed their signature the day and year first above set forth.

/s/ AUSTIN J. SHELTON,
Seller.

GUAM SERVICE GAMES, a
Guam Partnership,

By /s/ FLOYD G. BLAKE,
Buyer.

(Copy)

EXHIBIT "B"

Assignment

Whereas, the parties to this assignment have heretofore entered into a contract for the sale of a certain business owned by Mr. Austin J. Shelton to Guam Service Games, a partnership represented by Floyd Blake,

And, Whereas, the said contract contains a clause relating to accounts receivable and location contracts in the amount of Six Thousand Five Hundred ($6,500) and Eight Thousand Five Hundred ($8,500) Dollars, respectively,

And, Whereas, the parties to this assignment hereby agree that the figures set forth in the heretofore mentioned contract are incorrect and should read Seven Thousand Nine Hundred Fifty-Six and 56/100 ($7,956.56) Dollars, and Seven Thousand Dollars ($7,000), respectively,

And, Whereas, the parties mutually agree that these accounts receivable and contracts shall become the property of Guam Service Games.

Now, Therefore, in consideration of the facts set forth above, and of the mutual promises and covenants of the parties to this Assignment, I hereby assign over to Guam Service Games all of my right, title, and interest in the above-described accounts receivable and location contracts.

The parties hereby mutually agree and stipulate that the assignee covenants and warrants that he

will not sell, lease, or encumber in any way whatsoever, the materials and equipment sold by the said Austin J. Shelton to Guam Service Games until such time as the terms of the contract, and a certain promissory note, dated 9 February, 1954, are fully complied with, or his consent in writing is first procured from Mr. Austin J. Shelton.

Dated at Agana, Guam, this 9th day of February, 1954.

/s/ AUSTIN J. SHELTON,
Assignor;
GUAM SERVICE GAMES,

By /s/ FLOYD G. BLAKE,
Assignee and Partner.

EXHIBIT "C"

(Copy)

9 February, 1954.
Agana, Guam, M.I.

$30,000.00.

Promissory Note

For value received, six (6) months from date, I promise to pay to the order of Austin J. Shelton the sum of Thirty Thousand ($30,000) Dollars, without interest. Payments are to be made in monthly increments of Five Thousand ($5,000) Dollars, each Five Thousand ($5,000) Dollar increment due and payable on or before the 10th day of each month, with the first payment commencing on the 10th day of March, 1954. In the event of any default in payment of any of the above-mentioned Five Thousand ($5,000) Dollar increments, and if said default continues for a period in ex-

cess of ten (10) days, then the full balance of the note shall become payable without demand of Austin J. Shelton, or his assignees.

Dated at Agana, Guam, this 9th day of February, 1954.

GUAM SERVICE GAMES,
By /s/ FLOYD G. BLAKE,
Partner.

Witnesses:
/s/ EARL E. KLOPPENBERG.
/s/ B. G. CARLSON.

[Endorsed]: Filed July 23, 1954.

[Title of District Court and Cause.]

MOTION FOR TEMPORARY INJUNCTION

Plaintiff, Guam Service Games, a co-partnership, moves the Court for an order enjoining the Defendant, during the pendency of this proceeding, from engaging in the coin-operated machines business in the Territory of Guam, and further enjoining the said Defendant from interfering in any manner with the operations of the Plaintiff in such business.

Dated this 26th day of July, 1954.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

NOTICE OF MOTION

To: J. W. Davis, Attorney for Austin J. Shelton.

You will please take notice that the undersigned will bring the above Motion on for hearing before this Court, in the Guam Congress Building, City of Agana, Territory of Guam, on the 30th day of July, 1954, at 9:30 in the forenoon of that date or as soon thereafter as Counsel can be heard.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

AFFIDAVIT

Floyd G. Blake, being first duly sworn on oath, deposes and says:

That he is a co-owner of Guam Service Games, a co-partnership, Plaintiff in the above cause of action.

That Defendant, Austin J. Shelton, is engaging in the coin-operated machine business in the Territory of Guam, and is interfering with the coin-operated machine business of the Plaintiff, in violation of a written agreement.

That these acts on the part of the Defendant seriously threaten the welfare of the business of the Plaintiff, are causing irreparable damage to the Plaintiff and are causing great monetary loss to the Plaintiff.

/s/ FLOYD G. BLAKE.

Subscribed and Sworn to before me this 13th day of August, 1954.

[Seal] /s/ [Indistinguishable],
Deputy Clerk of the District Court.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 29, 1954.

District Court of Guam
Territory of Guam, Marianas Islands

GUAM SERVICE GAMES, a Co-Partnership,
Plaintiff,

vs.

AUSTIN J. SHELTON,
Defendant.

Civil Case No. 47-54

MOTION

Plaintiff, Guam Service Games, a co-partnership, moves the Court for leave to pay or deposit with the Court the sum of Five Thousand ($5,000.00) Dollars, representing the balance of moneys due from Plaintiff to Defendant under a certain agreement, subject of this suit, between Plaintiff and Defendant and dated February 1, 1954, such deposit to remain with the Court pending determination of the claim of Plaintiff for damages in this proceeding and for an Order of Court determining

such payment to be in full compliance with the terms of said agreement.

Dated this 11th day of August, 1954.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

NOTICE OF MOTION

To: J. W. Davis, Attorney for Austin J. Shelton.

You will please take notice that the undersigned will bring the above Motion on for hearing before this Court in the Guam Congress Building, City of Agana, Territory of Guam, on the 20th day of August, 1954, at 9:30 in the forenoon of that date or as soon thereafter as Counsel can be heard.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 11, 1954.

APPEARANCE AND ANSWER

Comes now the defendant by his attorney, J. W. Davis, enters his appearance and for reply to the complaint herein filed represents as follows, to wit:

I.

Neither admits nor denies the allegations of paragraph 1 of the said complaint, but requires strict proof thereof.

II.

Admits the allegations of paragraph 2 of the said complaint.

III.

Admits the allegation of a supplementary agreement set forth in paragraph 3 of the said complaint but requires strict proof of that portion of the allegation in connection with execution and delivery.

IV.

Admits the allegations of paragraph 4 of the said complaint.

V.

Expressly denies the allegations of paragraph 5 of the said complaint.

VI.

Expressly denies the allegations of paragraph 6 of the said complaint.

VII.

Expressly denies the allegations of paragraph 7 of the said complaint.

VIII.

Defendant respectfully represents in the nature of an affirmative answer that plaintiff, contrary to the allegations of the complaint, violated the terms set forth in the agreement and assignment, and that the plaintiff therefore comes into court with unclean hands.

IX.

Defendant complains against the prayer as a part

of the said complaint in that the amount of damages requested is in excess of that shown on the face of the complaint, and requests that certain immediate and emergency steps and orders be taken and issued by the court, request for the same and prayer for the same not being in due form.

Wherefore, defendant prays that the prayer of the said complaint be made proper.

Dated this 14th day of August, 1954, at Agana, Guam.

/s/ J. W. DAVIS,
Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 14, 1954.

[Title of District Court and Cause.]

MOTION

Comes now the defendant by his attorney, J. W. Davis, and respectfully moves this Honorable Court as follows:

That this Court by its Presiding Judge, Paul D. Shriver, declare itself disqualified to try the above-captioned civil action.

That the Honorable Paul D. Shriver disqualify himself for the purpose and purposes of the trial of the above-captioned civil action.

That the Honorable Judge sitting as trier of facts and determiner of law has clearly indicated during a hearing on motion for temporary injunction that he is highly prejudiced against the defendant in the above-captioned action.

That the record before this Court on the motion of plaintiff served on defendant on July 27, 1954, the Honorable Judge, Paul D. Shriver, sitting as trier of facts and determiner of law did clearly state that defendant was guilty of those alleged facts in the complaint filed by plaintiff herein which opinion, finding and judgment clearly indicates such a completely prejudiced attitude and finding that defendant feels compelled to file this motion.

This motion is also made because the remarks, expressed opinions, recorded findings and decision of the Court were made prior to even the joining of issues in the above-captioned matter inasmuch as at the time of the arguing and discussion of the motion the appearance and answer of the defendant to the complaint filed was not a matter of record.

Wherefore, defendant respectfully moves that this Honorable Court declare itself disqualified to hear the trial of such issues as may be joined and that a change of venue be ordered.

/s/ J. W. DAVIS,
Attorney for Defendant.

[Endorsed]: Filed August 16, 1954.

[Title of District Court and Cause.]

ORDER OF INJUNCTION

And Now on this 13th day of August, 1954, this matter having come on for hearing on the Motion of Plaintiff for an Order enjoining the Defendant

during the pendency of this proceeding from engaging in the coin-operated machines business in the Territory of Guam, and the Court having heard testimony adduced in open Court, both parties being present and represented by Counsel, and being now fully advised in the premises,

It Is Therefore Ordered, Adjudged and Decreed by the Court that the Defendant, Austin J. Shelton, be and he is herewith and forthwith enjoined, until the further Order of this Court, from engaging in the coin-operated machines business in the Territory of Guam, in any manner or form whatsoever, whether as owner, partner, agent, employee or otherwise.

It Is Further Ordered by the Court that no bond be required of the Plaintiff.

It Is Further Ordered by the Court that Plaintiff be and it is hereby authorized to pay to and deposit with the Clerk of this Court the sum of Five Thousand ($5,000.00) Dollars representing the balance of moneys due from Plaintiff to Defendant under that certain agreement, subject of this suit, and executed by Plaintiff and Defendant on February 1, 1954, such deposit to remain with the Court pending determination of Plaintiff's claim for damages in this proceeding, and such payment, when made, shall constitute compliance by Plaintiff with the terms of the said agreement.

Entered August 19, 1954.

/s/ PAUL D. SHRIVER,
Judge of the District Court
of Guam.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 19, 1954.

[Title of District Court and Cause.]

ORDER ON MOTION TO DISQUALIFY

The above-entitled defendant, by his counsel, moved the court to disqualify the incumbent judge for prejudice against the defendant.

The motion to disqualify is denied for the following reasons:

1. The court was not previously acquainted with the defendant prior to the defendant's testimony in connection with a motion for a temporary injunction. Any remarks made by the court were made in connection with the defendant's testimony on that occasion.

2. The court knows of no reason why it cannot hear the principal case on its merits and is not conscious of any attitude inconsistent with one of judicial fairness.

Dated and entered this 30th day of August, A.D. 1954.

/s/ PAUL D. SHRIVER,
Judge.

[Endorsed]: Filed August 30, 1954.

[Title of District Court and Cause.]

PRETRIAL ORDER

September 14, A.D. 1954, 9:30 A.M.

I. Pleadings

The plaintiff filed his complaint under date of July 23, 1954, in which it was alleged that the plaintiff and defendant entered into an agreement under the terms of which the defendant sold a coin machine business to the plaintiff for a consideration of $50,000 and the defendant agreed that he would not engage in the operation of a coin machine business for a period of five years in the Territory of Guam; that the defendant violated this agreement by engaging in such business. The plaintiff seeks damages in the amount of $100,000, an accounting of profits and that the defendant be enjoined from further violation. A temporary injunction was issued by the court. The defendant filed in effect a general denial and alleged that the plaintiff had violated its agreement by selling some of the machines without the defendant's permission.

II. Discussion at Conference

At the pretrial conference it developed that the plaintiff contends that after the agreement was entered into the defendant continued to operate a coin machine business through the device of having his wife enter such business while the defendant actually operated the same. The defendant contended that he was merely assisting his wife in the

operation of her business and that the plaintiff first breached the agreement by selling part of the property.

At a preliminary hearing the court enjoined the defendant from continuing his competition and further ordered that the final payment of the consideration for the agreement should be paid into the court pending disposition of the action upon its merits.

III. Witnesses for Plaintiff

1. Floyd Blake, a co-partner of the plaintiff, will testify that subsequent to the agreement entered into the defendant brought machines into Guam, placed such machines and collected from them in violation of his agreement.

2. Henry Atencio, Joaquin Rivera, Mrs. Illogan, Julia Evasco, a lessee of a bar known as Orchid No. 1, the owner of the Gold Star Cafe, a Mr. Artero and a Mr. Nito all will testify that machines were installed by the defendant who took care of such machines, the amounts of money taken from the machines and the amounts received by the defendant.

3. Arsemio Alvarez will testify as to an agreement entered into between him and the Shelton Music Company after the temporary injunction under the terms of which Alvarez repaired machines, made collections and turned the money over to the Shelton Music Company; that Alvarez has the right to place machines where he wishes and that certain of the machines placed by him were taken from defendant's home and placed in their

locations and that he moved other machines.

4. Frank Navarro, an employee of Alvarez, will testify as to making collections from machines placed by the defendant and turning money over to the Shelton Music Company.

5. A representative of the Government of Guam tax office will testify as to the amount of tax paid by the defendant or the Shelton Music Company subsequent to the agreement which was entered into between the plaintiff and the defendant.

IV. Witnesses for Defendant

1. The defendant will testify that his activities were limited to assisting his wife in the operation of her business.

2. Plaintiff's witnesses, Alvarez and Navarro, will testify that the plaintiff violated his agreement by disposing of machines contrary to the terms of his contract.

3. The defendant's wife will testify that prior to the date of the agreement she had been in the coin-operated machine business and that she is the owner and operator of the Shelton Music Company.

V. Stipulations

It was stipulated that either party may call additional witnesses by notifying the adverse party at least five days before the trial of the names of the witnesses and the expected testimony.

VI. Issues for Trial

1. Whether defendant breached his agreement

not to engage in a competitive business and if so the amount of damages.

2. Whether plaintiff breached the agreement not to dispose of property and if so whether the breach was cured by acceptance of subsequent payments.

VII. ORDER

It is herewith ordered:

The above-entitled action is set for trial October 11, 1954, at 9:30 a.m.

Dated and entered this 14th day of September, A.D. 1954.

/s/ PAUL D. SHRIVER,
Judge.

[Endorsed]: Filed September 14, 1954.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEY

Defendant, Austin J. Shelton, hereby substitutes Turner & Stevens, of Agana, Guam, as his attorneys in the above-entitled action, in the place and stead of J. W. Davis, of Agana, Guam.

Dated this 8th day of October, 1954.

/s/ AUSTIN J. SHELTON.

I hereby consent to the foregoing substitution.

Dated this 8th day of October, 1954.

/s/ J. W. DAVIS,
TURNER & STEVENS,
By /s/ LYLE H. TURNER.

[Endorsed]: Filed October 13, 1954.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between plaintiff and defendant that the following facts and exhibits hereinafter referred to, and none other, may be taken as proved as though actually testified to at the trial of this action.

1. On the 1st day of February, 1954, plaintiff and defendant entered into a written contract, a copy of which has been introduced as plaintiff's Exhibit "1," and on the 9th day of February, 1954, plaintiff and defendant entered into a written assignment and promissory note, which have been introduced as plaintiff's Exhibits "2" and "3," respectively.

2. By said agreement defendant sold plaintiff all of the assets of his coin-operated machine business in the territory of Guam, known as Flamingo Music and Novelty Company, with principal office in the Municipality of Agana.

3. Plaintiff was at the time of such sale operating a coin-operated machine business in the territory of Guam, with machines in all municipalities of Guam, except Umatac, Talofofo, Merizo and Inarajan.

4. Defendant delivered to plaintiff all of the consideration under said contract and plaintiff has paid to defendant the sum of $45,000.00 under said agreement and said promissory note and has deposited in court pursuant to an order of the court

the sum of $5,000.00, being the last payment due from plaintiff to defendant under the terms of the said note.

5. On the 10th day of May, 1954, defendant's wife secured a license to operate a coin-operated machine business in the territory of Guam and thereafter operated such a business in the territory of Guam, importing such machines, entering into contracts and agreements with commercial establishments in the territory of Guam, and did install the following coin-operated machines in the indicated places of business in the territory of Guam.

Type of Machine	Name of Business	Municipality-Location
Evan's Holiday Juke Box	Halenanea	Agana
Evan's Holiday Juke Box	Fifth Avenue	Agana
Evan's Holiday Juke Box	Artero's	Sinajana
Evan's Constellation and Bink's Counter Game	Cristobal's Store	Barrigada
Seeburg Juke Box and Bally Bowler	Gold Star Club	Dededo
Evan's Holiday Juke Box	Chicken House	Agana
Evan's Holiday Juke Box	19th Hole	Barrigada
Bally One Ball Machine	Filipino Corner	Agat
Bink's Counter Game	Tomas Cruz Store	Merizo

6. Defendant was connected with his said wife's business from and after the inception thereof in that he took part in the negotiation of contracts, installation and servicing of machines and the collection of the proceeds of said machines.

7. During the period ensuing from the time defendant's wife installed said machines, plaintiff did not solicit the installation of its machines in

the commercial establishments in which defendant's wife had installed machines.

8. At the time the parties entered into said instruments designated as Exhibits "1," "2," and "3," plaintiff placed a value to it of $30,000.00 for the physical equipment of defendant's business as then installed and operating in commercial business places, and the defendant placed a value of $35,000.00 upon said physical equipment, and the contracts and accounts receivable of defendant's business were jointly agreed upon as having the following values:

Accounts Receivable	$ 7,956.56
Contracts	7,000.00
Sub-total	$14,956.56

9. Plaintiff is unable to prove an actual monetary loss as a result of defendant's actions, as aforesaid, but claims damage for breach of the agreement. Plaintiff has contracted for and incurred attorney's fees in the sum of $1,500.00 in this action, and claims such attorney's expenses as a damage resulting from breach of the agreement.

10. That since the Spanish times in Guam, the Island has been geographically divided into municipalities; that attached hereto marked Defendant's Exhibit "A," is a map showing the historic development of such geographic municipalities; that the map entitled municipalities as of March 19, 1934, is the present geographic division of Guam into municipalities; that the Municipality of Agana

is shown on said map with the red crayon caption "Agana"; that any other crayon writing on said map shall not be considered as a part of the Exhibit; that certain areas within municipalities have been known as "districts," but have no geographic significance.

11. Plaintiff's counsel shall have twenty days within which to file a brief, and defendant's counsel shall have ten days within which to file a reply brief, the cause to be submitted to the Court for judgment upon the facts stipulated to herein.

Dated: Agana, Guam, this 25th day of October, 1954.

TURNER & STEVENS,
Attorneys for Defendant,

By /s/ LYLE H. TURNER

DUFFY & O'CONNOR,
Attorneys for Plaintiff,

By /s/ ROBERT DUFFY.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

BRIEF FOR PLAINTIFF

Statement of Facts

On October 25, 1954, a stipulation of facts was entered into between Plaintiff and Defendant. The

contract and note, subject of this suit, have been admitted in evidence as Plaintiff's Exhibits Nos. 1 and 3, respectively.

Under the contract, made on February 1, 1954, the Defendant transferred and assigned to the Plaintiff "all of his right, title and interest in and to his Coin-Operated Machine Business in the Territory of Guam, including all equipment, inventory, supplies, contracts, routes and locations, * * * together with miscellaneous parts for the above-named equipment, furniture and office equipment" then owned and used by the Defendant.

Under the stipulation, it is admitted that on May 10, 1954, Defendant's wife secured a license to operate a coin-operated machine business in the Territory of Guam, and thereafter operated such a business, importing such machines, entering into contracts and agreements with commercial establishments, and did install certain such machines in various municipalities in Guam. It is further admitted that defendant was connected with his wife's business from and after the inception thereof, in that he took part in the negotiation of contracts, installation and servicing of machines, and the collection of the proceeds of said machines.

Suit was filed herein on July 23, 1954, requesting specific performance and injunction, and damages for Defendant's violation of the contract, and for costs of action and reasonable attorneys' fees. It is also stipulated that Plaintiff has incurred, in the prosecution of this suit, attorneys' fees in the sum of Fifteen Hundred ($1,500.00) Dollars.

Legal Questions Presented

Inasmuch as the execution of the contract and the violation of the terms of the contract are admitted, the only remaining questions for legal determination are:

(a) Does the contract fall within the statutory exceptions permitting enforcement of contracts which would otherwise normally be considered as being in restraint of trade? (b) Is the contract valid, insofar as its terms are concerned, relating to the duration of the restraint and the territorial extent of the restraint? (c) Damages allowable to Plaintiff.

Section 1673 of the Civil Code of Guam provides: "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections is to that extent void."

Section 1674 provides: "One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified district, city, or a part thereof, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein."

There can be no question but that Defendant sold and transferred the goodwill of his business under the instant contract. In the case of Shafer vs. Sloan, 3 Cal. App. 335, 85 Pac. 162, the Court held that a written contract to sell "all my right, title and interest in and to the goods, wares and merchandise in my storeroom," agreeing that the

seller should not engage in that type of business, will be construed to carry with it the goodwill of the business. There can be no question, therefore, that the instant contract falls within the exception of Section 1674 of the Civil Code of Guam.

Validity of Contract

Under the old jurisprudence, when trade and the mechanic arts were in their infancy it was deemed a matter of public importance to encourage their growth and to prohibit contracts which tended to abridge them. Hence, the rule then was, that all contracts were void which in any degree tended to the restraint of trade, even in a particular, circumscribed locality, either for a definite period or an unlimited period.

But as trade and commerce increased this stringent rule has ceased and the rule has been relaxed and modified. The early cases of Wright vs. Ryder, 36 Cal. 342; Santa Clara Valley Mill and Lumber Co. vs. Hayes, 76 Cal. 387; and California Steam Nav. Co. vs. Wright, 6 Cal. 258, adopted the doctrine that the contracts to be valid should have a consideration, some good reason for entering into it, and must impose no restraint upon one party which is not beneficial to the other.

Contracts are not contenanced in which the restraint is confined to reasonable limits of time and place and which are founded upon a sufficient consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and to be limited to what

is fairly necessary, under the circumstances of the particular case, for the protection of the covenantee. Public welfare is first considered, and if it not be involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. Ghiradelli Co. Hunsicker, 164 Cal. 355, 128 Pac. 1041; Grogan vs. Chaffee, 156 Cal. 611, 105 Pac. 745.

In the case of Meyers vs. Merillion, 118 Cal. 352, the Court held that the language of the code is for reasonable construction so as to effect the end for which the legislature says such contracts may be made, and to give reasonable protection to him in whose favor such contract is made.

Duration of the Restraint

Periods of ten (10) years restraint have been held not to be unreasonable so long as the Plaintiff is engaged in the same business. Franz. vs. Bieler, 126 Cal. 176; City Carpet Works vs. Jones, 102 Cal. 506. And in the case of Akers vs. Rappe, 30 Cal. App. 290, the Court held that a contract not to engage in the same business for twenty (20) years in the city in which the business sold was conducted is not void on the ground that the period is unreasonably long.

To What Capacities Restraint Extends

In the case of Meyers vs. Merillion, 118 Cal. 352, the Court said: "An inhibition as to agency for others in a contract by one who has sold the good-will of a business, engaging not to carry on a like business, or act as agent in so doing, is within the provision of the code permitting a contract in re-

straint of trade * * *; and the language of the code is to receive a reasonable construction so as to effect the end for which the legislature says such contracts may be made and to give reasonable protection to him in whose favor such contract is executed, and the code provision as to carrying on similar business is not to be limited to carrying on as owner or proprietor but is equally inclusive of the conduct of it, wholly or in part, as agent of another. A similar opinion was rendered in the case of Marriman, et al., vs. Menzies, 115 Cal. 16.

Territorial Extent of Restraint

In City Carpet Works vs. Jones, 192 Cal. 506, Defendant covenanted not to engage in the type of business sold for a period of ten (10) years in the City or County of San Francisco, or in the County of Alameda, or in the County of San Mateo. The Court, in holding the Defendant liable for breach of contract held that the test to be applied is whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.

In the instant case, the Defendant covenanted not to engage in the coin-operated machine business in the Territory of Guam for a period of five (5) years from the date of the contract, in any manner or form, whatsoever, whether as owner, partner, agent, employee or otherwise, except as an employee of the Plaintiff, and that he would not interfere, directly or indirectly, in any manner or form with the busi-

ness of the Plaintiff, its assignees, successors or transferees.

The code gives no definition of the word "district," as such, as used in Section 1674 above cited. It is true that, as stipulated, certain areas in Guam, within municipalities, have been known, as "districts" but that they have no geographical significance. The decisions of Courts with reference to the interpretation of the meaning of the word vary greatly. In some cases the word has been held not to be synonymous with "county," and in other cases it has been held to be synonymous with "county." City of Chicago vs. Knobel, 232 Ill. 112, 83 NE 459; State vs. O'Brien, 35 Mont. 482, 90 Pac. 514; State vs. Mack, 134 Or. 67, 292 Pac. 306.

The word also has been held interpretive of embracing more than one county. 21 S D 97, 110 NW 36.

As used in Section 14, Article 2 of the State Constitution of New Mexico, "district" is descriptive of the territory which in legal contemplation comprises the visne over which the jurisdiction of the Court for purposes of prosecution for crimes and misdemeanors extends. State vs. Belles, 21 N M 16, 172 Pac. 196. It has also been held to be defined and geographic portion of a State, in construing a State Constitution. Rose vs. Superior Court in and for Imperial County, California. 252 Pac. 765.

In the Territory of Guam, the "District Court of Guam" has jurisdiction of all matters arising in the Territory under the laws of the United States, and has original jurisdiction in all other causes in the

entire Territory of Guam except those over which original jurisdiction has been transferred to and vested in the Island Court by Public Law 17.

While it is true that Section 1674 of the Civil Code refers to a "specific district, city, or part thereof," it is apparent from the comparison of that section with the same numbered section of the California Code, that the word "district" was used in place of the word "county" as contained in the California Code. With no cases interpreting the meaning of the word "district" as used in the Civil Code of Guam, a reasonable construction must be placed thereon, and it is apparent from the wording of the code that a district is meant to be a larger area than that of a municipality, and inasmuch as it was used to replace the word "county" as used in the California Code, it is also susceptible to the construction of including the entire Territory of Guam or such smaller portion thereof as the parties in the matter, by contract, specify.

Damages

With respect to damages allowable to Plaintiff, it is stipulated that Plaintiff has incurred expenses in the sum of Fifteen Hundred ($1,500.00) Dollars for the prosecution of this action.

Section 3300 of the Civil Code of Guam provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby * * *."

Section 3301 of the Civil Code of Guam provides:

"No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

In many jurisdictions it has been held that counsel fees and other expenses of litigation can be considered as an element of damages only in those cases in which exemplary damages are or can be awarded. However, in many jurisdictions the recovery of attorneys fees and expenses of litigation as a part of the costs is authorized by statute in certain classes of actions or proceedings or against certain classes of persons in actions arising from failure to perform or the violation of statutory or contractual obligations. 15 American Jurisprudence Sec. 146 and cases there cited.

It is contended, therefore, that attorneys fees in the sum of Fifteen Hundred ($1,500.00) Dollars and costs, are recoverable by the Plaintiff in this action, together with such other damages as the Court may determine to be consistent with the breach of the Defendant.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

[Endorsed]: Filed November 27, 1954.

[Title of District Court and Cause.]

DEFENDANT'S REPLY BRIEF

Statement of Facts

This is an action by plaintiff to recover damages resulting in an alleged breach of a contract by the

defendants, and plaintiff has asked for a permanent injunction restraining defendant from future violations. At a preliminary hearing the court granted a temporary injunction.

No trial was actually had, but the facts were stipulated to by plaintiff and defendant and were filed in this cause on the 25th day of October, 1954. The only facts to be considered by the Court are the facts as so stipulated. After the stipulation of facts was entered into, this Honorable Court requested briefs from counsel upon the legal issues involved.

Questions Presented

1. Does the contract fall within the statutory exceptions permitting enforcement of contracts which would otherwise normally be considered as being in restraint of trade?

2. If the contract is valid, what is the validity with respect to the duration and territorial extent of the restraint?

3. What are plaintiff's damages, if any?

Statutes Involved

Civil Code of Guam:

Section 4. Rules of construction. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this territory respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.

Section 1673. Contracts, restraint of trade. Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.

Section 1674. Exception, sale of good will. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified district, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein.

Introduction

Guam is a code jurisdiction and as such, the code provisions establish the law of this territory, see CC Sect. 4, supra.

Discussion

I.

Does the contract fall within the statutory exceptions permitting enforcement of contracts which would otherwise normally be considered as being in restraint of trade?

Defendant acknowledges that where, as is the case here, a sale of all of the assets of a business is made, the good will of the business is transferred with the assets and the sale is therefore within the provisions of C.C. 1674, which is an exception to the statutory prohibitions against restraint of trade as set forth in C.C. Section 1673. See Shafer v. Sloan, 3 C.A. 335, 85 Pac. 162; Streeter v. Rush, 25 Cal. 68.

II.

What is the duration and territorial restraint that is allowable?

Duration of Restraint:

(a) The contract in question provides as follows:

> "Seller hereby covenants and agrees that he will not * * * for a period of five (5) years from the date hereof * * *"

C.C. 1674 provides in part that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business "so long as the buyer or any person deriving title to the good will from him, carries on a like business therein."

Within the terms of the statute, the period of inhibition by contract may be during the period the buyer, or any person deriving title to the good will from him, carries on a like business. The courts have held that restraint may issue for the period the buyer or any person deriving title to the good will from him carries on the business, not exceeding the period provided for in the contract. (City Carpet Beating, etc., Works v. Jones, 102 Cal. 506, 36 Pac. 841, 843.)

(b) Territorial Extent of Restraint:

The Court of Appeals for the Ninth Circuit in the case of United States v. Johnson (181 Fed. (2) 577) had occasion to set forth the background of legislative history of the Codes of Guam and reached the

conclusion that they were derived from the Codes of California.

The Civil Code of Guam as adopted in March, 1934, took Sections 1673 and 1674 from the Civil Code of California. Section 1674 was enacted in California in 1872 and at the time of the adoption of the Guam Codes had been unchanged since its original enactment, and then read as follows:

> "Any person who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein."

Certainly the California legislature intended the limitations to apply to less than the entire state.

The Guam Code as adopted substitutes the term "district" for "county." The term "county" constitutes a subdivision of a state or, in England, a subdivision of the country. The term "district" means "one of the portions into which an entire state or country, or county, municipality or other political subdivision or geographical territory is divided for judicial, political or administrative purposes," see Rose v. Superor Court in and for Imperial County, 80 Cal. App. 739, 252 Pac. 765, 770. There appears no question that in enacting Section 74 into Guam law, a subdivision of the territory of Guam was intended and contemplated. The substitution of the term "district" for "county" is com-

pletely understandable when we look at the stipulated facts. The term "county" has never been used in Guam for purposes of subdividing the territory. At the time the codes were adopted in Guam, there were "districts" which were definite geographical areas. Although the term "district" has lost some of its actual usage, Guam is still divided into municipalities and subdivided into districts. Although it has lost its precise geographical significance, there is no question that a "district" as used in the statute is a subdivision is lesser part of the territory of Guam and does not include the entire territory.

Plaintiff attempts to establish that the injunction sought may extend to the entire territory of Guam on the theory that the use of the word "district" in the caption of this court, whose jurisdiction extends throughout the territory of Guam, does give a basis for defining the term "district" as used in Section 1674 to include the entire territory of Guam. There is no basis for such construction. Section 1674 was enacted in 1934. The District Court of Guam was created in 1950. Obviously, the intent of the statute at the time of adoption of the Codes cannot be based upon a subsequent enactment, especially when the event occurs sixteen years later.

Furthermore, the caption of this Honorable Court and the area over which its jurisdiction extends was established by an act of the United States Congress and a Federal statute cannot serve as a purpose for determining the interpretation of a territorial code section. The use of the word "district" in the caption of this Court is consistent with the evident

intent of Congress to give a similar name to all Federal courts of first instance and was not an attempt to create a "District" of the territory of Guam for purposes other than to define the territory jurisdiction of this court.

Under modern interpretations where the contract is too embracing with respect to territory, it will be construed to be operative within (in California) the county or portion thereof in which the business is located (Mahlstedt v. Fugit, 190 P(2d) 777, 779, and other cases therein cited).

The restraint, if any, imposed herein must be limited to the "district" or "municipality" within defendant's business is located, i.e., Agana.

In none of the cases on this subject has the factor that the business is necessarily carried on outside the subdivision of the state or territory, been given any consideration. To do so would be in the face of the statute (C C 1674) which sets up only two exceptions to the general prohibition—duration and territorial limitations.

The statute may be outmoded, but the duty of correcting legislation is for the Legislature and for a court to vary the obvious intent and meaning of a statute is to violate the separation of powers doctrine.

III.

What are plaintiff's damages, if any?

By the stipulation of facts, plaintiff is unable to prove any actual damages resulting from a violation, and is therefore only entitled to nominal damages.

Plaintiff claims it is entitled to recover attorney's fees in this action, but the rule is that attorney's fees are only allowed where agreed upon by contract or allowed by statute. (City of Los Angeles v. Abbott, 217 Cal. 184, 17 P(2d), 993. See also Bank of America National Trust & Savings Association v. West End Chemical Co., 37 Cal. App. 2d 100 P (2d) 318.) Furthermore, in every case digested on this subject attorney's fees were not a part of the damages awarded. See California cases cited supra under Points II and III. They are not recoverable as costs except as allowed by statute and the statute allows only $10.00 for each day of actual court attendance.

Respectfully submitted,

TURNER & STEVENS,
Attorneys for Defendant;

By /s/ LYLE H. TURNER.

Dated: December 3, 1954.

[Endorsed]: Filed December 7, 1954.

[Title of District Court and Cause.]

MOTION FOR SHOW CAUSE ORDER

Plaintiff, Guam Service Games, a co-partnership, moves the Court that an Order be entered herein requiring the Defendant, Austin J. Shelton, to appear and show cause why he should not be held in contempt of this Court for violation of the injune-

tion order of this Court entered herein on 13 August, 1954.

This motion is based upon the files and records of this proceeding and upon the affidavit of Nolan P. Preedit submitted herewith.

Dated this 8th day of December, 1954.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

AFFIDAVIT

Nolan P. Preedit, being first duly sworn on oath, deposes and says:

1. That he is a temporary resident of the Territory of Guam, and has resided therein for more than one (1) year last past.

2. That he is acquainted with Austin J. Shelton, Defendant in Civil Case No. 47-54, now pending in the District Court of Guam.

3. That on or about the 10th day of November, 1954, Affiant received a message to the effect that Austin J. Shelton wished to talk with him; that as a result of the receipt of such message, Affiant went to the home of Austin J. Shelton in Agana, Guam, and conferred with him for approximately four (4) hours.

4. That the said Shelton asked Affiant if he would be interested in taking over the coin-operated machine routes for him, the said Shelton, as an employee.

5. That on a later date Affiant brought to the said Shelton a coin-operated music box to be repaired, and that the said Shelton personally repaired the same.

6. That the said Shelton further offered to purchase from the Affiant coin-operated machines owned by Affiant.

7. That Affiant is acquainted with Amanda Shelton, the wife of the said Austin J. Shelton, and that the said Amanda Shelton was not present at any time during the conference between Shelton and Affiant nor at any time during the period that the said Shelton repaired Affiant's coin-operated music box.

Dated at Agana, Guam, this 8th day of December, 1954.

/s/ NOLAN P. PREEDIT.

Subscribed and Sworn to before me this 8th day of December, 1954.

/s/ [Indistinguishable],
Deputy Clerk of the District
Court of Guam.

[Endorsed]: Filed December 8, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

A Motion having been filed herein by the Plaintiff for an Order requiring the Defendant to show

cause why he should not be held in contempt of Court for failure to abide with a previous Order of Injunction entered herein on 13 August, 1954, and it appearing to the Court from the files and records of this proceeding and from the Affidavit of Nolan P. Preedit attached to said Motion, that Plaintiff is entitled to such Order,

It Is Therefore Ordered, Adjudged and Decreed by the Court that Austin J. Shelton, Defendant, be and he is hereby directed to appear before the District Court of Guam on December 13, 1954, at the hour of 1:30 o'clock p.m. and show cause why he should not be held in contempt of this Court by reason of failure to abide by the terms of the Order of Injunction entered herein on 13 August, 1954.

It is further ordered that a copy of the Motion, Affidavit in support thereof, and a copy of this Order be served on the Defendant, Austin J. Shelton, or upon his Counsel at least three (3) days prior to the date of the said hearing.

Entered this 9th day of December, 1954.

/s/ PAUL D. SHRIVER,
Judge, District Court of
Guam.

[Endorsed]: Filed December 9, 1954.

[Title of District Court and Cause.]

OPINION

The defendant as the then owner of a coin-operated machine business, sold such business, including

all assets, accounts receivable, etc., to the plaintiff, a co-partnership, for a consideration of $50,000. At the time of sale the defendant agreed that for a period of five years he would not engage in such business as owner, partner, agent, employee or otherwise in the territory of Guam, except as he might be employed by the plaintiff. The defendant breached the agreement by taking advantage of his knowledge and skill to place his wife in the same business and then assisting her to compete with the defendant. He was temporarily enjoined and the final payment due him on the purchase price of the business was ordered paid into court.

The defendant has admitted the breach but contends under Guam law a territory-wide restraint is not authorized, that plaintiff is not entitled to attorney's fees or other than nominal damages for the breach.

The business in question involves the locating of coin-operated machines, mostly juke boxes, in bars, restaurants, stores and other places, where customers by inserting an appropriate coin may hear selected music or play games, replete with clicks, moving lights, scores and similar features to induce those with both coins and time to spend both. The owner of the machines must service them, collect the proceeds and pay either commissions, rentals or both to the proprietors where the machines are placed and, of course, the business flourishes in proportion to the number of machines which can be placed at suitable locations.

There is no question as to the intent of the parties

to prohibit the defendant from competing in the business in Guam for a period of five years. The applicable code provisions are Sections 1673 and 1674 of the Civil Code of Guam.

> "1673. Contracts, restraint of trade. Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.
>
> "1674. Exception, sale of good will. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified district, city or part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein." (Underscoring supplied.)

These provisions were taken from the Civil Code of California, as were most Guam Civil Code provisions, and may be construed in the light of California decisions, United States v. Johnson, 9 Cir., 181 F. 2d 577. However, the provisions in Section 1674 of the California Code referred to "county, city or part thereof." This section was subsequently amended after the adoption of the Guam Code and includes "a specified county or counties, city or cities, or a part thereof," Section 16601, California Business and Professions Code.

The applicable construction of these code provisions is well stated in Mahlstedt v. Fugit, 79 C.A. 2d 562, 180 P. 2d 777:

"The law in force at the time the contract was executed became a part of the contract and it is presumed that the parties contracted with knowledge of the law. On the date of the contract sections 1673 and 1674 of the Civil Code were in effect. (These provisions with slight modifications are now sections 16600 and 16601 of the Business and Professions Code.) As authorized by said sections of the Civil Code appellant, having transferred the good will of his business, agreed to refrain from carrying on a similar business for a period of ten years. He contends that that portion of his agreement was void because it did not, as required by section 1674, specify the territory within which he agreed not to carry on his business. If such a contract is indefinite as to time or territory the court will construe it in such manner as to make it valid. If the contract is unrestricted as to the territory in which the seller agreed to refrain from competition with the purchaser of his business, or if it includes more territory than that provided by law it will be construed to be operative within the county or portion thereof in which the business is located (City Carpet, etc., Works v. Jones, 102 Cal. 506, 512 [36 P. 841]; Stephens v. Bean, 65 Cal. App. 779, 783 [224 P. 1022]; General Paint Corp. v. Seymour, 124 Cal. App. 611, 614 [12 P. 2d 990]), and if the agreement is indeterminate as to the period of its operation, or is without time limit, the court will construe it to cover the time per-

mitted by law. (Gregory v. Spieker, 110 Cal. 150, 153 [42 P. 576, 52 Am. St. Rep. 70]; Brown v. Kling, 101 Cal. 295, 298 [35 P. 995].) In the instant case the contract did not specify the territory in which appellant agreed that he would not engage in business. Prior to the sale appellant's business had been carried on in Los Angeles County and after the sale respondent conducted his business in the same county. The court construed the contract to be limited to the territory in which the parties respectively had conducted their businesses and restrained appellant from infringing on respondent's business in Los Angeles County. We find no error in the restraint thus imposed on appellant."

It has been noted that the Guam law refers to "district." There was no county political unit and while the defendant suggests that there were districts in Guam, there is no evidence that districts had any geographical significance. In adopting the California codes by executive fiat, the effort was to bring to Guam a body of American law in lieu of the Spanish Civil Law. To attempt to establish legislative intent in connection with the provisions under consideration is quite useless. When the Civil Code was adopted in 1933 Guam was largely an agrarian community. By present standards there were few automobiles. The city of Agana was the capital and possibly over fifty per cent of the island population resided there. Guam was divided into about 14 municipalities covering an area of roughly 225 square miles. The business, governmental, social

and cultural center was Agana. Agana was almost completely destroyed during World War II and while after the war the United States Navy, as the governing authority, laid out a model city, property line disputes were not resolved and many postwar businesses and residences were located at other places accessible by modern highways. Agana ceased to have the dominating importance it had before the war, and the plaintiff in this case can carry on its business in any part of Guam with an ease unknown when the codes were adopted.

To attempt by analysis to compare Guam and California is equally fruitless. If the defendant had entered into a similar contract in California he could be restrained from violating that contract in an area larger than Guam and containing many times its population.

The plaintiff paid a large consideration for what it bought. The intent of the parties is clear. The type of business involved is not a common one. Others than the defendant can engage in it if they so desire and can make the investment required. The Guam code contemplates that such restraints as those contained in the agreement are valid within the limitations prescribed. The court holds that the word "district" can properly be construed in Guam as meaning any area the parties agree upon; that in the circumstances of this case the defendant should be enjoined from violating his agreement in the territory of Guam. To hold otherwise would permit the defendant to violate his agreement without serving any useful public purpose since changed

conditions make it impossible for the court to attempt to define an area other than that agreed upon by the parties.

The parties did not provide either for attorney's fees or for liquidated damages for breach of the agreement. This court must follow the general rule that in the absence of any contractual or statutory liability therefor, attorneys' fees in a case of this type cannot be recovered, 15 Am. Jur. 550; Standard Accident Ins. Co. of Detroit v. Hull, 91 F. Supp. 65.

The parties have stipulated that the plaintiff is unable to prove an actual monetary loss as a result of the defendant's breach, hence only nominal damages may be recovered, 15 Am. Jur. 392. Such damages are awarded in the amount of one dollar and costs of suit. Plaintiff's attorneys shall prepare a decree in accordance with this opinion and settle within 20 days. The amount being held in the registry of the court, less damages and costs, shall be held pending the disposition of an order to show cause for violation of the temporary injunction previously issued. Such temporary injunction shall continue in effect until the final decree is entered.

Dated and entered this 9th day of December, A.D. 1954.

/s/ PAUL D. SHRIVER,
Judge.

[Endorsed]: Filed December 9, 1954.

[Title of District Court and Cause.)

STIPULATION

It is hereby stipulated by and between counsel for plaintiff and defendant, that Four Thousand Dollars ($4,000.00) of the amount deposited by the plaintiff with the Court, may be immediately disbursed to the defendant.

Dated: December 14th, 1954.

/s/ ROBERT E. DUFFY,
TURNER & STEVENS,

By /s/ LYLE H. TURNER,
Attorneys for Defendant.

So Ordered December 14, 1954.

/s/ PAUL D. SHRIVER,
Judge.

Check No. 4607—

[Endorsed]: Filed December 14, 1954.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between counsel for plaintiff and defendant that the order to show cause issued by the court on the 9th day of December, 1954, to the defendant may be vacated and the motion for order to show cause filed herein by the

plaintiff on the 8th day of December, 1954, be withdrawn.

Dated: Agana, Guam, this 22nd day of December, 1954.

/s/ ROBERT E. DUFFY,
Attorney for Plaintiff.

TURNER & STEVENS,
By /s/ LYLE H. TURNER.

Approved:

/s/ PAUL D. SHRIVER,
Judge, District Court of Guam.

[Endorsed]: Filed December 22, 1954.

District Court of Guam, Territory of Guam, Marianas Islands

Civil Case No. 47-54

GUAM SERVICE GAMES, a Co-Partnership,
Plaintiff,

vs.

AUSTIN J. SHELTON,
Defendant.

JUDGMENT

An Now, on this 22nd day of December, 1954, the above-entitled cause came on for hearing by the Court without a jury and upon a Stipulation of Facts entered into on October 25, 1954, by the parties hereto, and the Court having considered

said facts, as stipulated, and the brief of the Plaintiff and of the Defendant heretofore filed herein, and being now fully advised in the premises, and having heretofore filed herein its written Opinion, it is hereby

Ordered, Adjudged and Decreed that Plaintiff recover of and from the Defendant, for damages, the sum of One ($1.00) Dollar, and costs of suit in the sum of One Hundred Thirty-five ($135.00) Dollars.

It Is Further Ordered, Adjudged and Decreed by the Court that the Defendant, Austin J. Shelton, be and he is hereby enjoined from engaging in the coin-operated machine business in the Territory of Guam, in any manner or form whatsoever, whether as owner, partner, agent, employee, or otherwise, except as an employee of Plaintiff, for a period of time extending to and including January 31, 1959, provided that Plaintiff, or its successors or assigns, is engaged in such business in the Territory of Guam.

Entered this 22nd day of December, 1954.

/s/ PAUL D. SHRIVER,
Judge, District Court of
Guam.

Approved as to form and amount of costs.

TURNER & STEVENS,
By /s/ LYLE H. TURNER,
Attorney for Defendant,
Austin J. Shelton.

[Endorsed]: Filed December 22, 1954.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by the parties hereto that defendant herein be, and he is hereby entitled to withdraw from the District Court of Guam any and all monies previously deposited therein by the above-named defendant, and specifically the sum of $1,000.00 previously deposited.

Dated: Agana, Guam, this 22nd day of December, 1954.

/s/ ROBERT E. DUFFY,
Attorney for Plaintiff.

TURNER & STEVENS,
By /s/ LYLE H. TURNER,
Attorney for Defendant.

Approved:

/s/ PAUL D. SHRIVER,
Judge District Court of Guam.

[Endorsed]: Filed December 23, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Austin J. Shelton, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit

from the final Judgment entered in this action on the 22nd day of December, 1954.

Dated: January 11, 1955.

SPIEGEL, TURNER &
STEVENS,
By /s/ LYLE H. TURNER,
Attorneys for Appellant.

[Endorsed]: Filed January 11, 1955.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME

Court is respectfully moved to extend the time for the defendant to file herein his designation on points of appeal and the record to be transcribed, until and including the 30th day of March, 1955.

Dated: Agan, Guam, the 18th day of February, 1955.

TURNER & STEVENS,
By /s/ RUSSELL L. STEVENS,
Attorneys for Defendant.

[Endorsed]: Filed February 18, 1955.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME

Upon Motion of counsel for defendant, and the court being fully advised in the premises, it is hereby

ordered, adjudged and decreed that the defendant may and he does have until and including March 30, 1955, in which to file herein his designation on points of appeal and the record to be transcribed.

Dated: Agana, Guam, the 18th day of February, 1955.

/s/ PAUL D. SHRIVER,
Judge, District Court of
Guam.

[Endorsed]: Filed February 18, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Defendant-appellant herewith presents the points upon which he claims the court erred:

1. The court erred in holding the provision of the contract between the parties restraining defendant from engaging in the coin operated machines business in Guam, for a period of five years to be valid and legal.

2. The court erred in awarding payment of attorney's fees or other than nominal damages to plaintiff.

3. The judgment and conclusion of law are contrary to the stipulations of fact.

Dated: Agana, Guam, the 30th day of March, 1955.

SPIEGEL, TURNER &
STEVENS,

By /s/ RUSSELL L. STEVENS,
Attorneys for Appellant.

[Endorsed]: Filed March 30, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam, for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint, Filed July 23, 1954.
2. Motion and Notice of Motion With Affidavit of Floyd G. Blake Attached Thereto, Filed July 29, 1954.
3. Motion and Notice of Motion, Filed August 11, 1954.
4. Appearance and Answer, Filed August 14, 1954.
5. Motion for Disqualification of Judge, Filed August 16, 1954.
6. Order of Injunction, Filed August 19, 1954.
7. Order on Motion to Disqualify, Filed August 30, 1954.
8. Pretrial Order, Filed September 14, 1954.
9. Substitution of Attorney, Filed October 13, 1954.
10. Stipulation of Facts, Filed October 25, 1954.
11. Brief of Plaintiff, Filed November 27, 1954.

12. Defendant's Reply Brief, Filed December 7, 1954.

13. Motion for Show Cause Order, Filed December 8, 1954.

14. Order to Show Cause, Filed December 9, 1954.

15. Opinion, Filed December 9, 1954.

16. Stipulation, Filed December 14, 1954.

17. Stipulation, Filed December 22, 1954.

18. Judgment, Entered and Filed December 22, 1954.

19. Stipulation, Filed December 23, 1954.

20. Notice of Appeal, Filed January 11, 1955.

21. Motion for Extension of Time, Filed February 18, 1955.

22. Order for Extension of Time, Filed February 18, 1955.

23. Statement of Points, Filed March 30, 1955.

24. Designation of Record on Appeal, Filed March 30, 1955.

25. Plaintiff's Exhibits Nos. I, II, III, IV, V, VI and VII are the Original Documents Filed in the Office of the Clerk of the District Court of Guam, in the above-entitled case.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M. I., this 30th day of March, A.D., 1955.

[Seal] /s/ ROLAND A. GILLETTE.

[Endorsed]: No. 14719. United States Court of Appeals for the Ninth Circuit. Austin J. Shelton, Appellant, vs. Guam Service Games, a Co-partnership, Appellee. Transcript of Record. Appeal from the District Court, District of Guam, Territory of Guam.

Filed April 7, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

No. 14719

AUSTIN J. SHELTON,

Appellant,

vs.

GUAM SERVICE GAMES, a Co-Partnership,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON WHICH HE INTENDS TO RELY ON APPEAL AND DESIGNATION OF RECORD IN SUPPORT THEREOF

Comes now Austin J. Shelton, appellant above named, through his undersigned attorneys, and, pursuant to Rule 17 (6) of the above-entitled Court, makes this, his statement of points on which he intends to rely on appeal, as follows:

1. The Trial Court erred in holding that the provision of the contract between the parties restraining appellant from engaging in the coin-operated machine business in Guam for a period of five (5) years was valid and binding on appellant.

2. The Trial Court erred in enjoining appellant from engaging in the coin-operated machine business in the entire Territory of Guam; that the restraint, geographically, went beyond the intents of the parties and the limits allowed by the applicable law.

3. That the Trial Court erred in holding that appellant had breached his agreement with appellee.

4. That the Trial Court erred in entering Judgment against appellant, for if appellant breached his agreement, the said breach was thereafter cured.

Appellant, in support of each and all of the foregoing points, designates all of the record in this case certified to the above-entitled Court by the Clerk of the District Court of Guam, for the Territory of Guam.

Dated: April 14, 1955.

SPIEGEL, TURNER &
STEVENS,

By /s/ ALBERT A. SPIEGEL,
Attorneys for Appellant.

[Endorsed]: Filed April 15, 1955.

No. 14719.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUSTIN J. SHELTON,

Appellant,

vs.

GUAM SERVICE GAMES, A Co-partnership,

Appellee.

APPELLANT'S OPENING BRIEF.

SPIEGEL, TURNER & STEVENS, and
GERALD G. WOLFSON,
613 Wilshire Boulevard,
Santa Monica, California,
Attorneys for Appellant.

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No. 14719.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUSTIN J. SHELTON,

Appellant,

vs.

GUAM SERVICE GAMES, A Co-partnership,

Appellee.

APPELLANT'S OPENING BRIEF.

Appellant appeals from the judgment of the court below enjoining him from engaging in the coin-operated machine business in the Territory of Guam for a period of time to and including January 31, 1959. [Tr. pp. 53-54.]

Jurisdictional Statement.

The jurisdiction of the court below was invoked under Section 22A of the Organic Act of Guam (48 U. S. C., Sec. 1424(a)), which provides in part as follows:

> "The District Court of Guam shall have . . . original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature . . ."

Jurisdiction of this court to hear this appeal is conferred by the provisions of Title 28 U. S. C. 1291.

Statement of the Case.

All of the facts in this case were stipulated to by the parties and may be summarized as follows: Appellant was the owner of a coin-operated machine business, known as the Flamingo Music and Novelty Company, in the Territory of Guam with principal office in the Municipality of Agana. On February 1, 1954, appellant and appellee entered into a written agreement whereby appellant sold to appellee all his right, title and interest in and to said business for the sum of $50,000.00. [Tr. p. 24.] Paragraph 5 of the agreement provides as follows:

> "5. SELLER hereby covenants and agrees that he will not, within the Territory of Guam, for a period of five (5) years from the date hereof, engage in the coin operated machines business, in any manner or form, whatsoever, whether as owner, partner, agent, employee or otherwise, except as an employee of the BUYER herein. It is further agreed that if the BUYER consents to hire the SELLER as an agent or employee then said BUYER will offer to the SELLER, as salary, the going normal wage usually paid to persons engaged in similar type of work in the Territory of Guam, at the time of the hiring of the employee; SELLER further covenants that he will not interfere, directly or indirectly, in any manner or form with the business of BUYER, his assignees, successors or transferees."

Thereafter, the consideration provided for in the agreement was delivered by appellant to appellee and appellee paid to appellant the sum of $45,000.00 and deposited in

court the sum of $5,000.00, being the last payment due from appellee to appellant. [Tr. pp. 24-25.]

Appellant's wife, on May 10, 1954, secured a license to operate a coin-operated machine business in the Territory of Guam and thereafter operated the business in the Territory. Appellant was connected with this business from and after the inception thereof and aided and assisted his wife in the operation of the business. [Tr. p. 25.] Appellee was unable to show any actual money damages as a result of said acts. [Tr. p. 26.]

With regard to the geographic division of Guam, the parties stipulated as follows:

> "10. That since the Spanish times in Guam, the Island has been geographically divided into municipalities; that attached hereto marked Defendant's Exhibit 'A,' is a map showing the historic development of such geographic municipalities; that the map entitled municipalities as of March 19, 1934, is the present geographic division of Guam into municipalities; that the Municipality of Agana is shown on said map with the red crayon caption 'Agana'; that any other crayon writing on said map shall not be considered as a part of the Exhibit; that certain areas within municipalities have been known as 'districts,' but have no geographic significance." [Tr. pp. 26-27.]

Specification of Errors Relied Upon.

(1) The court below erred in holding that appellant should be enjoined from engaging in the coin-operated machine business throughout the entire Territory of Guam.

(2) The court below erred in holding that the word "district" as contained in Section 1674 of the Civil Code of Guam should be construed as meaning any area the parties agree upon.

(3) The court below erred in holding that changed conditions made it impossible to attempt to define the word "district" as used in Section 1674 of the Civil Code of Guam.

Statutory Provisions Involved.

Civil Code of Guam:

"1673. *Contracts, restraint of trade.* Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.

"1674. *Exception, sale of good will.* One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified district, city or part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein."

ARGUMENT.

Summary.

The contract restraining appellant from engaging in the coin-operated machine business throughout the entire Territory of Guam violates Sections 1673 and 1674 of the Guam Civil Code. These sections limit the maximum restraint that may be imposed to a specified district or city. The court below nevertheless held that the agreement was valid, and, accordingly, enjoined appellant from engaging in such business in the Territory of Guam. Appellant contends that the said Code sections prohibit an Island-wide restraint, and that, accordingly, he cannot be restrained from doing business in any place other than the Municipality of Agana, the principal office of the business sold by appellant to appellee.

I.

A Covenant to Refrain From Engaging in Business Throughout the Entire Territory of Guam Violates Sections 1673 and 1674 of the Civil Code of Guam.

The agreement between the parties attempted to prohibit appellant from engaging in the coin-operated machine business anywhere within the Territory of Guam. On its very face the agreement was invalid and in violation of Sections 1673 and 1674 of the Civil Code of Guam. Yet the court below would enforce the agreement to the letter.

Section 1673 declares that all contracts in restraint of trade are void otherwise than is provided in Sections 1674

and 1675. Section 1675 is immaterial herein. Section 1674 allows the seller of a business to agree "to refrain from carrying on a similar business within a specified district, city or a part thereof." In spite of this clear territorial limitation, the court below enjoined appellant from engaging in the business anywhere within the Territory of Guam.

How did the court below grant this broad injunction in the very face of Section 1674? A reading of the court's opinion [Tr. pp. 45-51] shows that the court reached this result by rewriting Sections 1673 and 1674 to express its own philosophy in the matter. Indeed, the court frankly says: "To attempt to establish legislative intent in connection with the provisions under consideration is quite useless." [Tr. p. 49.] And the court does not attempt to conceal that it is legislating when it says: "To hold otherwise would permit the defendant to violate his agreement without serving any useful purpose since changed conditions make it impossible for the court to attempt to define an area other than that agreed upon by the parties." [Tr. pp. 50-51.]

In stretching the term "district" to cover the entire Territory of Guam, the court is guilty of judicial legislation as demonstrated by the following language appearing in *Hughes v. Ewing,* 93 Cal. 414, 417, 28 Pac. 1067:

> "The power to change the boundaries of the district, as well as to define them in the first instance, is of legislative origin, and whether exercised immediately by the legislature or mediately by a board of supervisors—the local legislature—is, whenever exercised, a legislative act."

Of course, it is well recognized that courts have no legislative authority and should avoid the usurpation of legislative powers. It is not a court's province in the course of construction of a statute to make or supersede legislation. A statute may not be, under the guise of interpretation, modified, amended, remade or rewritten, or given a construction repugnant to its terms.

In *City Carpet, etc., Works v. Jones,* 102 Cal. 506, 511, 36 Pac. 841, the court in construing the almost identical California statute said as follows:

> "The Code introduces no new principle; it simply eliminates from the controversy arising upon such restriction the question as to what is a reasonable territorial limit, by specifically defining it, and thus preventing litigation; and in this the statute is wise and salutary, even though in certain cases, possibly in this one, it gives the purchaser less than he bought and less than he might enjoy without violating the interests of the public."

It was the lower court's duty then to follow the territorial restraint defined by Section 1674 rather than to determine for itself the territorial limit which might appear necessary to protect the purchaser. If changed conditions in Guam necessitate, as the court suggests, a broader protection for the purchaser, the rewriting of Sections 1673 and 1674 should be left to the legislature.

II.

Had It Been the Legislative Intent to Allow Island-wide Restraints of Trade, the Statute Would Have Expressly so Provided.

The plain meaning of Sections 1673 and 1674 of the Civil Code of Guam is that a seller cannot validly agree to refrain from engaging in competition in any area other than a "specified district, city or part thereof." Had it been the legislative intent to allow an island-wide restraint, it would have been a simple matter, indeed, to have so provided.

The Civil Code of Guam, including Sections 1673 and 1674 was taken from the Civil Code of California. The Code was adopted by executive order of the Naval Government on December 28, 1933. (*United States v. Johnson* (9th Cir.), 181 F. 2d 577.) The Naval Government in adopting the California Civil Code in 1933 did not do so in any helter skelter or superficial manner. The first codification of Guam's corpus juris in 1933 was the result of a two-year labor, begun in Governor (Captain) E. S. Roots' administration under the direction of Lt. Commander (later Capt.) S. B. Robinson assigned to the project from the Navy Department. As the laws and orders were revised, they were referred to judges, attorneys and civil leaders in Guam for study and discussion. The final product had the approval of all consulted. United States Navy Report on Guam, 1899-1950, page 118.

Section 1673 of the Civil Code was copied word for word from the California Civil Code. Section 1674 is an exact copy of Section 1674 of the California Civil Code, except that the Guam version substitutes the word "district" in the place and stead of "county" contained in the

California Code Section. (The California Code sections as subsequently amended are now found in the Calif. Bus. and Prof. Code, Secs. 16600 and 16601.) Had the Guam draftsman wished to omit the territorial limitation contained in the California Code, he had open to him either one of two obvious courses. First, in copying the California Statute, he could have omitted the phrase "a specified county, city or part thereof" and substituted in lieu thereof "Island of Guam." Secondly, and even more simply, he could have merely omitted the phrase "within a specified county, city or part thereof" and the last word of the section "therein." In either case the legislative intent would have been clear: that there was to be no territorial limitation to an agreement not to compete.

Of course, the legislature did not so provide. It is not difficult to see why the allowable restraint was not made island-wide. First, Section 1674 is, after all, an exception to Section 1673, the latter section prohibiting every contract in restraint of trade other than allowed by Sections 1674 and 1675. If Section 1674 provided for no limitation on territorial restraint at all, the exception to the rule would have swallowed up the rule. The purchaser of a business could secure a complete restraint of trade as against the seller despite the fact that Section 1673 purports to invalidate such restraints.

Secondly, there is sound public policy for the legislature's refusal to allow island-wide restraints of trade. As the California court said in *Brown v. Kling,* 101 Cal. 295, 299, 35 Pac. 995:

> "A contract restraining one from following a lawful trade or calling at all is invalid because it discourages trade and commerce, and prevents the party from earning a living."

The necessary purport of the restrictive covenant which it is sought to enforce in the present case is that nowhere in the Territory of Guam, for five years, may appellant pursue the line of business in which he was engaged at the time the contract was executed. It is against the policy of the state or territory that its citizens should not have the privilege of pursuing their lawful occupations at some place within its borders, and that a citizen should be compelled to leave the state or territory to engage in his business and to support himself and family.

In *Lanzit v. Sefton Manf. Co.,* 184 Ill. 326, 56 N. E. 393, 395, the Illinois court had before it the question as to how far effect could properly be given to covenants not to carry on a trade or business. The covenant involved was to refrain for ten years from engaging in the business of manufacturing or selling certain paper products within the United States, the state of Indiana and the state of Illinois. The trial court entered a decree giving effect to the covenant insofar as it applied to the states of Indiana and Illinois. The court held such decree improper and called attention to the settled rule that contracts in general restraint of trade are void as being against public policy and the court in this connection said as follows:

> "The effect of the contract, if enforced as decreed below, would be to deprive the public—the people of the whole state—of the industry and skill of appellant in the particular trade or business in which he may be most skillful and useful, and compel him to engage in some other business, or move to another state in order to support himself and family; in other words, to expatriate himself, so far as his citizenship of this state extends, and go beyond our jurisdiction."

III.

The Guam Statute Being Almost Identical With the California Statute, the Court Below Should Have Given Great Weight to the California Decisions Construing the California Statute.

Since Sections 1673 and 1674 were taken almost verbatim from the California Civil Code, it is helpful to review the California decisions construing the almost identical California Code sections. As stated in *United States v. Johnson* (9th Cir.), 181 F. 2d 577, 580:

> "When the appropriate authority adopted from California a code of laws designated to replace the original part—Spanish law, it might be inferred that such codified rules . . . were intended to have the same significance and scope as they have been given by the Supreme Court of the state from which the Code was taken."

A reading of the California decisions shows that the California courts have scrupulously followed the territorial limits imposed by California Civil Code Section 1674. In each of the cases hereinafter cited the parties attempted to restrain competition in an area greater than that allowed by the statute. In each of these cases the court followed the statute rather than the intention of the parties and restricted the restraint to the area allowed by the statute. In each of these cases, therefore, the purchaser received less than he bargained for.

In *General Paint Corp. v. Seymour*, 124 Cal. App. 611, 12 P. 2d 990, the covenant not to compete provided that the seller would not "engage in the manufacturing, sale or distribution of paint or varnishes or any like products within the limits of the State of California." The court

recognized that this territorial limit exceeded that permitted by Section 1674 of the Civil Code but held that the lower court correctly ruled the agreement was valid as far as the County of Los Angeles, the principal place of business, was concerned. The seller in *City Carpets, etc., Works v. Jones,* 102 Cal. 506, 36 Pac. 841, agreed not to engage in business in the Counties of San Francisco, Alameda and San Mateo. While the court held that the limitation was invalid as to Alameda and San Mateo Counties, it upheld the restriction as to the City and County of San Francisco, in which the property and business were located.

The California decisions are summarized in *Mahlstedt v. Fugit,* 79 Cal. App. 2d 562, 566, 180 P. 2d 777, as follows:

> "If the contract is unrestricted as to the territory in which the seller agrees to refrain from competition with the purchaser of his business, or if it includes more territory than that provided by law, it will be construed to be operative within the county or portion thereof in which the business is located (citing cases)"

Section 1674 of the Guam Civil Code should likewise be construed to limit the agreement in question to the district or city in which the principal place of business is located.

IV.

Section 1674 of the Guam Civil Code Limits the Territorial Restraint Which May Be Imposed by a Covenant Not to Compete to a Geographical Subdivision of the Territory of Guam, to-wit: a Municipality or City.

We have already pointed out that had the Naval Government intended to allow an island-wide restraint of trade, it would have been a simple matter to have so provided in enacting Section 1674. It is equally significant that the government in actually enacting Section 1674 replaced the term "county" appearing in the California Code section with the term "district." The term "county," of course, represents a specific geographical subdivision of the State of California. In using the term "district" in the place and stead of "county" the government must have similarly meant to limit the allowable territorial restraint to a specific geographical subdivision of the Territory of Guam. This construction is in accord with the definition generally given to the term "district" by the courts.

> "In its ordinary meaning the word *'district'* is commonly and properly used to designate any one of the various divisions or subdivisions into which the state is divided for political or other purposes and may refer either to a congressional, judicial, senatorial, representative, school or road district, depending always upon the connection in which it is used."
>
> *Olive v. State,* 11 Neb. 1, 13-14, 7 N. W. 444.

" 'District' derives its meaning from the Latin, meaning jurisdiction. The word describes a special geographical area over which specific authority, executive, legislative, or judicial is exercised by properly constituted authorities."

Hammond v. Young, et al., 117 N. E. 2d 227, 231.

A district is "a portion of territory specifically set off or defined as for judicial, political, educational, or other purposes."

City of Louisville, M. H. Commission v. Public Housing Admin., 261 S. W. 2d 286.

The term "district" means "a geographical part of the state."

Rose v. Superior Ct. of Imperial County, 80 Cal. App. 739, 748, 252 Pac. 765.

The United States Supreme Court has held "district" to mean a part or portion of a state. *Kelly v. Sands,* 99 U. S. 441, 25 L. Ed. 327. In *Union Pacific v. Cheyenne,* 113 U. S. 516, 55 S. Ct. 601, 28 L. Ed. 1078, the Supreme Court held "district" signified any territorial division smaller than a county.

Taking the ordinary accepted meaning of "district" then, the plain meaning of Section 1674 is that a seller may not agree to refrain from carrying on a business other than within a specified geographical subdivision of the Territory of Guam.

The court below in defining "district" as "any area the parties agree upon" [Tr. p. 50] failed to actually define the term; that is, the court did not define the specific geographical area covered by the word "district." In this regard the parties stipulated "That certain areas

within municipalities have been known as 'districts' but have no geographical significance." [Tr. p. 27.] It was further stipulated "That since the Spanish times in Guam, the Island has been geographically divided into municipalities . . . that the map entitled municipalities as of March 19, 1934, is the present geographic division of Guam into municipalities." [Tr. p. 26.] Since the only geographic subdivision in Guam is the municipality, the word "district" as used in Section 1674 must be defined to mean municipality.

An examination of the Government Code of Guam discloses that the terms "district" and "municipality" have been given an equivalent treatment by the legislature and that the two terms have, at least on occasion, been used interchangeably. Government Code Section 2060 (set forth in the Appendix) provides for the appointment of registration clerks for 20 separate areas therein set forth. 13 of these areas are designated as municipalities. The remaining 7 areas are designated as districts or groups of districts. Thus, municipalities and districts are treated equally in that a registration clerk is assigned to both districts and municipalities.

Section 15000 of the Government Code (set forth in the Appendix) provides for the appointment of commissioners or assistant commissioners for districts and municipalities. Again, municipalities and districts are treated equally by the legislature in the matter of local government. Moreover, it should be noted that in Section 2060 the legislature refers to Sinajana as a district. In Section 15000 it refers to the same area as a municipality [Deft. Ex. "A" shows Sinajana to be a municipality]. Clearly, in this one instance at least, the legislature has regarded the terms "municipality" and "district" to be

interchangeable. See *Acme Dairy Co. v. Astoria,* 49 Ore. 520, 523, 90 Pac. 153, where the court held "district" and "municipality" to mean the same thing, saying "The words 'municipality' and 'district,' as used in the clause of the amendment adverted to are evidently expressions of equivalent import. . . ."

Whether the suggested definition of "district" is accepted by this court or not, it is clear that in no event can the term "district" be stretched to mean the entire Territory of Guam. It was stipulated by the parties that at the time the agreement was entered into appellant's principal office was located in the Municipality of Agana. [Tr. p. 24.] In applying Sections 1673 and 1674 to the agreement in the instant case the injunction then, should be limited in territorial restraint to the Municipality of Agana.

Conclusion.

For the foregoing reasons, we respectfully submit that the judgment of the court below should be reversed and the cause remanded with instructions to modify the injunctive portion of its judgment by limiting the restraint therein imposed to the Municipality of Agana.

Dated: July 8, 1955.

Respectfully submitted,

SPIEGEL, TURNER & STEVENS, and
GERALD G. WOLFSON,
Attorneys for Appellant.

APPENDIX.

Government Code of Guam.

Section 2060. *Registration clerks: appointment.* The Election Commissioner shall appoint a Registration Clerk for each of the following areas:

(a) Municipality of Dededo, not including the district of Tamuning.

(b) District of Tamuning.

(c) Municipality of Yigo.

(d) Municipality of Barrigada, not including the district of Mangilao.

(e) District of Mangilao.

(f) Districts of Sinajana and Papato.

(g) Municipality of Asan.

(h) Municipality of Talofofo

(i) Districts of Paasan and Agana Heights.

(j) Municipality of Yona.

(k) Municipality of Agana.

(l) Municipality of Piti.

(m) Municipality of Agat, not including the District of Santa Rita.

(n) Municipality of Merizo.

(o) Municipality of Umatac.

(p) Municipality of Inarajan.

(q) District of Santa Rita.

(r) Districts of Mongmong, Didigue, Toto and Jalaguac.

(s) Districts of Chalan Pago and Ordot.

(t) District of Maina.

Section 15000. *Apportionment.* There shall be a commissioner and/or assistant commissioner for the municipalities and villages of Guam as indicated in the following table:

Area	Commissioner	Assistant Commissioner
Municipality of Agana	1	0
Municipality of Sinajana (Sinajana Village)	1	1
Agana Heights (Paasan)	0	1
Chalan Pago and Ordot	0	1
Municipality of Yona	1	0
Municipality of Talofofo	1	0
Municipality of Inarajan	1	0
Municipality of Merizo	1	0
Municipality of Umatac	1	0
Municipality of Agat	1	0
Santa Rita Village	1	0
Municipality of Piti	1	0
Municipality of Asan	1	0
Municipality of Barrigada	1	1
Mangilao Area	0	1
Village of Tamuning	1	0
Municipality of Dededo	1	0
Municipality of Yigo	1	0
Mongmong, Toto, Maite	1	0
	16	5

Section 15009. *Same; duties.* A Commissioner and/or Assistant Commissioner is the direct administrative representative of the people residing in the area from which he is elected, and as such he shall perform the following duties:

(a) Cooperate with members of the Department of Public Safety and other law enforcement agencies in the maintenance of peace, order and tranquility in the area.

(b) Enforce such sanitary and health laws and regulations as are or may be prescribed by the government of Guam.

(c) Maintain a census of all residents of his jurisdiction, which shall list the name, age, address, occupation, and C. I. number of each resident of his jurisdiction.

(d) Cooperate with all officials of the government of Guam in order to promote health, education, peace and economic and social welfare of the people of his jurisdiction.

(e) Make monthly written reports to the Chief Commissioner of Guam covering conditions in his jurisdiction with recommendations for the betterment thereof.

(f) Supervise and coordinate the work of Assistant Commissioners of his jurisdiction.

No. 14,719

IN THE

United States Court of Appeals

For the Ninth Circuit

AUSTIN J. SHELTON,
Appellant,

vs.

GUAM SERVICE GAMES, a co-partnership,
Appellee.

APPELLEE'S REPLY BRIEF.

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Appellee.

APPELLEE'S REPLY BRIEF.

This case was tried in the Court below upon a written stipulation as to the operative facts. Accordingly, all of the facts are before this Court and no useful purpose would be served in reiterating those matters set forth in appellant's opening brief. We pass, then, to the sole issue involved.

1. THE ISSUE.

The sole issue is whether a contract in question under the terms of which appellant agreed that he would not for a period of five years within the Territory of Guam engage in the coin operated machine

business in any manner or form either as owner, partner, agent, employee, or otherwise except as an employee of appellee is not restraint of trade. It should be noted that appellee purchased the coin operated machine business from appellant together with the good will thereof for the sum of $50,000.00.

Reference is made in appellant's opening brief to the applicable Guam law, to wit, Sections 1673 and 1674 of the Civil Code of Guam. As noted in the brief of appellant and in the opinion of the Honorable Court below, the principal difficulty arises from the interpretation of Section 1674. That section reads:

> "1674. *Exception, sale of good will.* One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified district, city or part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein."

Nowhere in the Civil Code of Guam is there a definition of the word "district."

The problem presented to this Court, then, resolves itself to a determination of whether an agreement to refrain from competing in the entire Territory of Guam is violative of Sections 1673 and 1674 of the Civil Code of Guam.

2. THE RULE AT COMMON LAW.

In some cases the Court has expressed the view that, at common law, an agreement to refrain from engag-

ing in a similar business within an entire state or county is void as an unreasonable restraint of trade. However, this is not the true common law rule. The rule at common law is that the restraint may not be any greater than is reasonably necessary to protect the buyer of the good will of the business. The territorial limits of such restraint, will thus vary with the circumstances of the case. For example in *Nordenfelt v. Maxim-Nordenfelt Co.,* 1894 A. C. 535, a restraint from competing in a similar business for the entire world was held not to be unreasonable in view of the particular circumstances of the case.

The common law rule is well stated by the Court in *Wright v. Ryder,* 36 Cal. 342, decided before the present California Code sections with respect to the restraint in trade were enacted. The Court said at page 357 of the opinion:

> "The general principles which govern contracts in restraint of trade are well settled, both in England and the United States. They proceed on the theory that the public welfare demands that private citizens should not be allowed, even by their own voluntary contracts, to restrain themselves unreasonably from the prosecution of trades, callings, or professions, or from embarking in business enterprises in the promotion and encouragement of which the public has an interest. At an early period in English jurisprudence, when trade and the mechanic arts were in their infancy, it was deemed a matter of the greatest public importance to encourage their growth and to prohibit contracts which tended to abridge them. Hence the rule first established was, that

all contracts were void which in any degree tended to the restraint of trade, even in a particular, circumscribed locality, either for a definite or unlimited period. But as population and trade increased, and there was consequently a greater competition in all useful pursuits, the necessity for the stringent rule which before prevailed had in a greater measure ceased, and the rule itself was greatly relaxed and modified. Instead of denouncing as void all contracts in restraint of trade, the rule, as relaxed, tolerated such as were restricted in their operations within reasonable limits. Hence it has been repeatedly decided both in England and America, that whilst a contract by an artisan not to follow his calling at any time or place was an unreasonable restraint upon trade, contrary to public policy, and therefore void, nevertheless if he contracted for a valuable consideration not to pursue his occupation within certain reasonable, restricted limits, the contract was valid and would be enforced. Thus, in *Alger v. Thacher,* 19 Pick. 51, the defendant had entered into a bond by which he bound himself not to carry on the business of an iron founder at any time or place, and the Court held the contract to be void, as an unreasonable restraint upon trade. This is a leading case on that point. So, in *Keeler v. Taylor,* 53 Penn. 468, 469, the Court says: 'But if the restraint be general, that is, not limited to a reasonable time and district, it is void at law, and of course will not be enforced in equity.' In Story on Contracts, Sec. 550 the rule is thus stated: 'An agreement in *general* or *total* restraint of trade is void, although it be founded on a legal and valuable consideration. * * * The same rule has been uniformly adhered to even to

the present day; an agreement, therefore, not to carry on a certain business anywhere is invalid, whether it be by parol or specialty, or whether it be for a limited or for an unlimited time;' and he quotes in support of the rule *Mitchell v. Reynolds,* 1 P. Will. 190; *Homer v. Ashford,* 3 Bing. 323; *Pierce v. Fuller,* 8 Mass. 223; *Nobles v. Bates,* 7 Cow. 307; *Morris v. Coleman,* 18 Ves. 436; *Hinde v. Gray,* 1 Man. & Grang. 195; *Alger v. Thacher,* 19 Pick. 51; to which may be added many other authorities from the Courts of England and America. 'But,' he adds (Sec. 551), 'an agreement in *partial* restraint of trade, restricting it within certain reasonable limits or times, or confining it to particular persons, would, if founded upon a good and valuable consideration, be valid. * * * Such an agreement not only does not obstruct trade, but is oftentimes requisite and necessary, as well for the advantage of the public as of the individual.' This proposition is maintained in *Rannie v. Irvine,* 7 Mann. & Grang. 976; *Chappel v. Brockway,* 21 Wend. 157; *Hartley v. Cummings,* 5 C. B. 247; *Bunn v. Guy,* 4 East. 190; *Pierre v. Woodward,* 6 Pick. 206; *Perkins v. Lyman,* 9 Mass. 522; *Hayward v. Young,* 2 Chit. 407; *Mallan v. May,* 11 Mees. & Wels. 653; *Wickins v. Evans,* 3 Young & Jerv. 318."

3. THE FACTS HERE INVOLVED.

The restraint here is for the entire Territory of Guam. In determining whether such restraint is reasonable or unreasonable consideration must first be given to the area involved, the nature of the terrain

and the population. This Court may take judicial notice of the fact that Guam is an island approximately thirty miles in length with a maximum width of eight miles; that the northern one-third portion of the island is covered with a heavy rain forest, and the population according to the 1950 census is 59,498. We have thus a territory and a population comparable with a small California county. (The lower Court in its opinion fixes the area as about 225 square miles.)

The nature of the business involved and the price paid for it must also be taken into consideration. There is a popular phrase—"We're dealing in nickels and dimes." In this case we have a business where we don't even get to dimes. But the purchaser paid $50,000.00 for this business. Obviously in a business where the return is so small, where a number of persons available as potential customers is so few and where the price paid for the business is so large, a purchaser needs protection for his investment. As the Court said in *Great Western Distillery Products, Inc. v. John A. Wathen Distillery Company,* 10 Cal. 2d 442, 448, 449:

> "The decisions in this state have recognized and applied the distinction made by authority elsewhere that if the public welfare be not involved and the restraint upon one party be not greater than protection to the other requires, the contract will be sustained although it in some degree may be said to restrain trade. (*Associated Oil Co. v. Myers, supra,* p. 306; *D. Ghirardelli Co. v. Hunsicker,* 164 Cal. 355 [128 Pac. 1041]; *Grogan v. Chaffee,* 156 Cal. 611 [105 Pac. 745, 27 L. R. A.

(N.S.) 395]; *Herriman v. Menzies,* 115 Cal. 16 [44 Pac. 660, 46 Pac. 730, 56 Am. St. Rep. 81, 35 L. R. A. 318]; *Twomey v. Peoples' Ice Co.,* 66 Cal. 233 [5 Pac. 158]; *Schwalm v. Holmes,* 49 Cal. 665; *Noble v. Reid-Avery Co.,* 89 Cal. App. 75 [264 Pac. 341]; *Appalachian Coals, Inc. v. United States,* 288 U. S. 344, 360, 361 [53 Sup. Ct. 471, 77 L. Ed. 825]; *Board of Trade v. United States,* 246 U. S. 231, 238 [38 Sup. Ct. 242, 62 L. Ed. 683, Ann. Cas. 1918D, 1207]; *United States v. American Tobacco Co.,* 221 U. S. 106, 179, 180 [31 Sup. Ct. 632, 55 L. Ed. 663]; *Gibbs v. Baltimore Gas Co.,* 130 U. S. 396, 409 [9 Sup. Ct. 553, 32 L. Ed. 979]; *Peerless Pattern Co. v. Gauntlett Dry Goods Co.,* 171 Mich. 158 [136 N. W. 1113, 42 L. R. A. (N.S.) 843], and cases cited in note; *J. W. Ripy & Son v. Art Wall Paper Mills,* 41 Okl. 20 [136 Pac. 1080, 51 L. R. A. (N.S.) 33].)"

4. THE PUBLIC POLICY INVOLVED.

Contracts in restraint of trade are not *per se* bad. A contract restraining one from following a lawful trade or calling may be invalid because it discourages trade and commerce, and prevents the party from earning a living, but the right to agree to refrain from his calling, within reasonable limits as to space may have the contrary effect. It encourages trade, for it gives value to a custom or business built up by making it salable. In considering these factors, the California Supreme Court said in *Brown v. Kling,* 101 Cal. 295, 300:

> "One rule at common law applicable to this matter was that the restraint should be no greater than is necessary to protect the purchaser. * * *"

The California Supreme Court in *City Carpet, etc., Works v. Jones,* 102 Cal. 506, 511, involving a contract in which the seller of a business agreed to refrain from competition in the Counties of San Francisco, Alameda and San Mateo, said:

> "At common law the territorial restriction imposed by this contract would doubtless have been considered valid, inasmuch as a portion of the value of the goodwill may have accrued from customers residing in these contiguous counties, though the business was conducted in one alone; and the purchaser, unless restricted by statute, or by a controlling public policy, was entitled to the whole of the goodwill which he purchased and paid for. It was not, therefore, at common law an illegal contract, nor are such contracts declared by the statute to be illegal. They are simply void so far or to the extent that they exceed the restrictions imposed by the statute. The code introduces no new principle; it simply eliminates from the controversy arising upon such restriction the question as to what is a reasonable territorial limit, by specifically defining it, and thus preventing litigation; and in this the statute is wise and salutary, even though in certain cases, possibly in this one, it gives the purchaser less than he bought and less than he might enjoy without violating the interests of the public. The statute imposes no penalty upon the purchaser under such contract, nor could it require the seller to resume business."

5. THE EFFECT OF THE GUAMANIAN CODE UPON THE COMMON LAW RULE.

As the Supreme Court of California pointed out in *City Carpets, etc., Works v. Jones,* 102 Cal. 506, 511 and reiterated in *Merchants Ad-Sign Co. v. Sterling,* 124 Cal. 429, 433:

> "* * * the code introduces no new principles; it simply eliminates from the controversy arising upon such restrictions the question as to what is a reasonable territorial limit."

With this in mind, we must look to the provisions of the Guamanian Code to see whether it is merely declarative of the common law or whether it substitutes a specific territorial limit to replace the uncertain rule of the common law which depends upon "reasonableness". It is significant that the stipulation of facts in this case states that the word "district" is of no territorial significance. The inclusion of the word "district" in the Guamanian Code is thus open to two constructions:

A. It is meaningless and the rule of the common law is applicable.

B. It is of some meaning territorially.

If we adopt proposition A as the proper premise, then the rule as to allowable restraint is the common law rule. If this be so, a restraint for the Territory of Guam, a small, sparsely populated island, is not an unreasonable restraint in the sale of a business and goodwill for the sum of $50,000.00.

If we adopt the second proposition, then we must look somewhere outside of the Guamanian Code for the meaning of the word "district". Black's Law Dictionary, Fourth Edition, page 562, gives the following definition:

> "*District.* One of the portions into which an entire state or country, county, municipality or other political subdivision or geographical territory is divided, for judicial, political, or administrative purposes. Briggs v. Stevens, 119 Or. 138, 248 P. 169; State ex rel. Schur v. Payne, 57 Nev. 286, 63 P.2d 921, 925.
>
> "The United States are divided into judicial districts, in each of which is established a district court. They are also divided into election districts, collection districts, etc.
>
> "The circuit or territory within which a person may be compelled to appear. Cowell. Circuit of authority; province. Enc. Lond."

We find—and the parties have so stipulated—no segregation of Guam as to geographical districts. However, there is a Judicial District of Guam. If the Judicial District is the district referred to in the Guamanian Code, it includes the entire Island of Guam, and thus the contract in question does not fall within the ban of the code section.

The attention of the Court is directed to the well established rule of statutory construction that when a contract is capable of two constructions, the one making it valid and the other void, the first ought to be accepted. See *Herzog v. Purdy,* 119 Cal. 99; *McVicker*

v. McKenzie, 136 Cal. 656, 660; *Pacific Wharf Co. v. Standard American Dredging Co.,* 184 Cal. 21, 25.

6. REPLY TO APPELLANT'S CONTENTIONS.

Commencing with page 13 of his brief, appellant seeks for a strained construction of the word "district". He tells us that in applying the California Code to the Guamanian situation, the term "district" was substituted for the word "county". He tells us then that by reason thereof the Guamanian codifier must have meant a specific territorial limitation, but it nowhere appears what that specific limitation was. It is significant that in the division of Guam into a district for purposes of the jurisdiction of its only court, the Code encompasses the entire territory.

We have no quarrel with the definition of the word "district" as given in *Olive v. State,* 11 Neb. 1, 13-14, 7 N.W. 44; *Hammond v. Young, et al.,* 117 N. E. 2d 227, 231; *City of Louisville, M. H. Commission v. Public Housing Admin.,* 261 S. W. 2d 286 or the other cases cited by appellant. In fact these cases lend strength to our position. Particular attention is directed to the portions of the opinions in *Hammond v. Young* and *City of Louisville, M. H. Commission v. Public Housing Admin.* which appellant has cited in his brief.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the lower Court is correct; that the Guamanian Code either is merely declarative of the common law which imposes a "reasonable" territorial restriction or the word "district" as used in said Code must mean the only district of any territorial import that we have been able to find—the area over which the jurisdiction of the District Court of the District of Guam, Territory of Guam is exercised.

Dated, San Francisco, California,
November 1, 1955.

ROBERT E. DUFFY,
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Attorneys for Appellee.

No. 14719

IN THE

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FOR THE NINTH CIRCUIT

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Appellant,

vs.

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Appellee.

Appeal From the District Court of Guam, Territory of Guam.

APPELLANT'S REPLY BRIEF.

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No. 14719

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Appellee.

Appeal From the District Court of Guam, Territory of Guam.

APPELLANT'S REPLY BRIEF.

I.

Appellee Seeks to Give Section 1674 a Construction That Would Make Its Territorial Limitations Meaningless and Ineffective.

At page 9 of its brief, appellee states,

> ". . . The inclusion of the word 'district' in the Guamanian Code is thus open to two constructions:
>
> "A. It is meaningless and the rule of the common law is applicable.
>
> "B. It is of some meaning territorially."

Appellee's proposition "A" contains two fallacies. In the first place, it is a *non sequitur*. Even conceding that the term "district" itself is meaningless, it does not fol-

low that Section 1674 is meaningless, or that the rule of the common law becomes applicable. Appellee does not try to give any effect to the statute after ruling out the term "district" as meaningless. Instead, appellee concludes that the rule of the common law is automatically applicable. However, it is obvious that if "district" is dropped entirely from Section 1674, the statute does not automatically wither away. It still limits the restraint to "a specified city or part thereof." If appellee's argument is followed to its logical end, it proves nothing, for the remaining territorial restraint is even less than that urged by appellant.

Secondly, to say that the rule of the common law is applicable is to say that Section 1674 is ineffective. Appellee concedes, at page 9 of its brief, that the purpose of the statute is to define what is a reasonable territorial limit. Yet appellee would render nugatory the territorial limit created by the statute and, instead, revert to the rule of the common law. To say the least, this is straining the process of statutory construction to its very limits. The statute may not be given a construction by which its effectiveness would be destroyed. (50 Am. Jur. 361.)

The alternative construction offered by appellee is equally untenable. Appellee says that if "district" is to be given any meaning it must mean the Judicial District of Guam. The simple answer is that while Section 1674 was enacted in 1933, the Judicial District of Guam was not created until 1950. (48 U. S. C. A. 1424.) Obviously, the legislative intent of the Guam legislature in 1933 cannot be divined from legislation of Congress 17 years later. Furthermore, Congress used the term "Judi-

cial District" here in the same sense as it used it with reference to judicial districts elsewhere; the term was not intended to have any peculiar meaning as far as Guam is concerned.

Conclusion.

We respectfully submit that the error of the lower court in rendering Section 1674 nugatory is emphasized rather than diminished by the arguments advanced by appellee. Accordingly, the judgment of the court below should be reversed and the cause remanded with instructions to modify the injunctive portion of the judgment by limiting the restraint therein imposed to the Municipality of Agana.

Dated: November 23, 1955.

Respectfully submitted,

SPIEGEL, TURNER & STEVENS, and
GERALD G. WOLFSON,
Attorneys for Appellant.

No. 14,743

United States
COURT OF APPEALS
for the Ninth Circuit

HERBERT SIMPSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon

OPENING BRIEF FOR APPELLANT

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OPENING BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of contempt of Congress (2 U.S.C. Sec. 192). The cause was tried before a jury and Honorable George H. Boldt, Judge. Appellant was found guilty on five counts and was meted a sentence of 10 months in jail and a fine of $250.00.

Jurisdiction of this Court to review the judgment of conviction is conferred by 28 U.S.C., Sec. 1291 and Rule 37 (a) of the Federal Rules of Criminal Procedure.

STATUTE INVOLVED

The pertinent statute involved, 2 U.S.C., Sec. 192, provides as follows:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes a default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

STATEMENT OF THE CASE

Amongst the subpoenas issued by the House Committee on Un-American Activities for appearance of witnesses to testify at a televised hearing before that Committee in the U.S. Court House at Portland, Oregon, was a subpoena issued and served upon Herbert Simpson, appellant herein. He appeared as directed on June 18, 1954, but he was not called to testify until June 19, 1954. The members of the subcommittee present on the day in question were Representatives Harold H. Velde, chairman, and James B. Frazier. Robert L. Kunzig, the chief witness for the prosecution, acted as counsel for the subcommittee.

Many questions were put to appellant inquiring of Communist membership and activity by him. In refusing

to answer most of the questions he evoked the Fifth Amendment to the U.S. Constitution as well as other amendments. On December 1, 1954, the following indictment for contempt was issued against appellant:

"THE GRAND JURY CHARGES:

Introduction

That on or about June 19, 1954, at Portland, in the State and District of Oregon, a duly authorized subcommittee of the Committee on Un-American Activities of the House of Representatives of the Congress of the United States of America was conducting hearings, pursuant to Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828), and to H. Res. 5, 83d Congress.

That the defendant, HERBERT SIMPSON, appeared as a witness before that subcommittee, at the place and on the date above stated, and was asked questions which were pertinent to the question then under inquiry. At the place and time stated, the defendant, Herbert Simpson, refused to answer those pertinent questions. The allegations of this introduction are adopted and incorporated into each of the counts of this indictment which follow, each of which counts will in addition merely describe the question which was asked of the defendant, Herbert Simpson, and which he, the said Herbert Simpson, refused to answer, all in violation of Title 2, U.S.C., Sec. 192.

COUNT I

Mr. Simpson, would you please state your residence?

COUNT II

Isn't it a fact that you live at 9115 North Geneva, Portland, Oregon?

COUNT III

Where are you presently employed, Mr. Simpson?

COUNT IV

Would you give this Committee, please, a brief resume of your educational background?

COUNT V

Now, Mr. Simpson, did you ever go to high school?

COUNT VI

Were you ever in the Armed Forces of the United States?

Dated at Portland, Oregon, this 30th day of November, 1954

A TRUE BILL.

/s/ Mabel W. Windnagle
Foreman, United States Grand Jury

BAIL $750.00
C. E. LUCKEY
United States Attorney
for the District of Oregon
/s/ C. E. Luckey
Endorsed:
Filed December 1, 1954
F. L. Buck, Acting Clerk
by V. O. Bishop, Deputy."

A motion to dismiss the indictment was filed on behalf of appellant on December 27, 1954 (Tr. of Rec. 12). This motion was supported by affidavit of the appellant as well as a brief, and a brief in opposition to the motion was filed by the prosecution on December 27, 1954 (Tr. of Rec. 23). On December 29, 1954, appellant filed a motion for a subpoena duces tecum to require the chief investigator of the Un-American Activities Committee or other representative of the Committee to appear at the trial and produce reports, documents and papers in the Committee's possession and that the same be made avail-

able for the inspection of counsel for appellant before trial (Tr. of Rec. 31). The Court did not rule upon that motion and on January 13, 1955, appellant filed a new motion for subpoena duces tecum and for inspection, and also moved that in the event that the prosecution failed to produce the said witnesses and documents, the appeal be dismissed and further, that in the event that the Court failed to dismiss the indictment pursuant to motion previously filed, the cause be postponed until such time as the witnesses and documents sought are produced and made available in Court. This motion was made to supplement the previous motion and was supported by detailed affidavits (Tr. of Rec. 33-37).

On January 20, 1955, the day of trial, the Court denied the motion, the case was tried before a jury and after the Court dismissed count III, the jury returned a verdict of guilty on the other five counts. On January 25, 1955, appellant filed a motion for new trial and for an extension of time to amplify, amend and supplement that motion and appellant also moved that he be permitted to submit further testimony on the issues that the Court had confined to itself without the intervention of the jury (Tr. of Rec. 39-41). These motions were denied on January, 31, 1955, and on the same date appellant was sentenced to ten months in jail and a fine of $250.00. The Trial Court admitted appellant to bail (Tr. of Rec. 42).

The Transcript of Proceedings is typewritten and consists of three parts. The pages of the first part are numbered from 1 to 9. Immediately following is the second part with two pages of indexes and pages num-

bered from 1 to 135, which includes the proceedings and the testimony of the day of trial, January 20, 1955. The third part contains the proceedings after the trial and consists of pages 1 to 72 and follows immediately after page 135 of the second part. The Transcript of Record is also typewritten and is separately bound and consists of consecutively numbered pages from 1 to 56.

SPECIFICATION OF ERROR No. 1

The Court erred in denying appellant's motion for a subpoena to subpoena three witnesses at government expense and a motion for subpoena duces tecum and a motion for inspection.

ARGUMENT

Appellant filed a motion under Rule 17 of Federal Rules of Criminal Procedure for subpoena duces tecum and for inspection of documents, etc., in possession of the Committee, on December 29, 1954 (Tr. of Rec. 31). Before this motion was acted upon, appellant filed an additional or supplemental motion on January 13, 1955 (Tr. of Rec. 33). The latter motion also asked for a dismissal of the case or for a postponement of it in the event that the Government failed or refused to comply with the motion. No action was taken on these motions until the date set for the trial, i.e. January 19, 1955, at which time the Court stated (Tr. of Proc. 9), "In the Wollam case the motion is denied and in the others a final ruling will be held in abeyance." On January 20, 1955, after the jury was empanelled, the Court stated (Tr. of Proc. 3),

". . . I feel that the showing made is wholly inadequate to justify the issuance of the subpoena or to permit the inspection."

The salient portions of Rule 17 are as follows:

"Rule 17. Subpoena

(b) Indigent Defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

Appellant's motion is clear and specific and sets forth that appellant does not have the means of paying the witness which he needed for his defense and it specifically names the witnesses and gives their addresses. It names a specific document, a summary used by Robert L. Kunzig when he interrogated appellant at the subcommittee hearing. It also asks for other papers and documents in the possession of the Committee. The previous existence of the summary mentioned was verified by two items of evidence, one is by witness Tom Griffin, appearing on pages 94 and 95 of the Transcript of Proceedings. The other will be observed in a picture showing Mr. Kunzig and taken at the time appellant was being interrogated by Mr. Kunzig and is amongst exhibits 9 to 12. The Court will note that in that picture Robert L. Kunzig, the interrogator, has right before him a typewritten summary.

The motion is supported by an affivadit of appellant in which he sets forth his indigent status, the names of the witnesses and their addresses and in it he further states that the witnesses to be subpoenaed have gathered and had information and that the Committee itself had evidence in its files that would show that appellant had good grounds under the Fifth Amendment to refuse to answer the questions propounded. It will be seen by examining the motion and affidavit from pages 35 through 37 of the Transcript of Record that appellant met all of the requirements that would justify the issuance of the subpoena and the requirement of the production of the documents for inspection and that the Trial Court abused its dis-

cretion in denying appellant's motion. It must further be borne in mind that there was no denial of the facts as set forth in the affidavit and that such facts must, therefore, be taken as true.

SPECIFICATION OF ERROR No. 2

The Court erred in denying appellant's motion for a continuance and postponement of the trial to a later date.

ARGUMENT

It was not until the day of trial and until the jury was empanelled that the Court ruled on appellant's motion for a subpoena duces tecum and for inspection (Tr. of Proc. 2-3). Likewise, although the Court was advised by appellant's counsel that appellant wished to move for a postponement of the trial in the event that the other motion was denied, the Court nevertheless empanelled and had the jury sworn in before it gave counsel an opportunity to make the motion for postponement of the trial. This was an abuse of discretion under the circumstances. The indigence of appellant was an undisputed fact in the record. One of the issues in the case was the pertinence of the questions asked on which the indictment was issued. Another issue was whether the privilege under the Fifth Amendment was rightly exercised by appellant. It is the firm belief of appellant that the documents that appellant sought to subpoena and inspect would have furnished conclusive evidence on behalf of appellant on both of these issues. For want of them appellant needed time and opportunity to obtain other evidence on these issues. This

could not be done after the jury was empanelled and before the jury was instructed, all on the same day.

Later events in the trial proved how right appellant was. The Court permitted Robert L. Kunzig to testify what the Committee was authorized to do and what the purpose of the sub-committee was in coming to Portland and asking the questions that it did. Although in appellant's view the questions were improper, appellant's objections were overruled and an answer given (Tr. of Proc. 15-25).

Appellant could have produced substantive expert testimony to disprove a great deal of the oral testimony of Mr. Kunzig. But for this appellant needed at least time if not money. If such expert testimony was properly admissible, appellant did have available, if time were given, the testimony of a writer, scholar, and college teacher who made a comprehensive study of the Committee and its purposes and whose testimony would have directly controverted Mr. Kunzig's.

Nowhere in the record either before or after the retirement of the jury did the Court designate a time for the presentation of testimony on the issues of pertinence or privilege, which issues the Court had reserved for itself.

A timely motion for continuance was made not only as a part of the motion for subpoena duces tecum on January 13, 1955, and again on the day of trial as soon as the Court permitted counsel to make the motion, but appellant's counsel again made the motion after appellee rested its case and appellant's motion to acquit was denied. It appears on page 107 of part 2 of Transcript of Pro-

ceedings and states as follows: "I move that this case be continued and postponed on the grounds that there are other necessary witnesses which I must get. Because of the developments that have occurred beyond my control, and particularly with reference to the ruling that was made on the motion the day before trial, and because of the development of testimony in a manner that I could not foresee, there are other witnesses whom I need and cannot obtain and will obtain on behalf of the defendant in this case. But I cannot present them this afternoon."

Again, at the time of presentation of arguments on appellant's motion for new trial, appellant asked for an opportunity to present further testimony on the issues of pertinence and privilege, which issues the Court had reserved for itself and determined as a matter of law (Tr. of Proc. Part 3, 39, 40).

The motion to postpone in this case was well taken and it was an abuse of discretion for the Court to have denied it.

SPECIFICATION OF ERROR No. 3

The Court erred in permitting the trial to continue before the jury empanelled.

ARGUMENT

On January 19, 1955, in the same Courtroom and before the same Court a panel of jurors was present and from it a jury was sworn to try the case against Donald Wollam, one similar in most respects to that of appellant. Donald Wollam was convicted by the 12 jurors selected

from that panel. The same panel appeared on the morning of January 20, 1955, when the Court required appellant to proceed with his trial, and the panel included all of the jurors who had sat on the Wollam case. In objecting to that particular jury, counsel for appellant stated:

> "I might say that there is an additional ground, and that is this: I desire to have answers to some specific questions. I do not believe that this jury can fairly try a second or a third case of the same nature or kind. I don't believe that - - -"

The Court interrupted as follows:

> "The Court: I can't hear you at any length, Mr. Lenske, on that. It is contrary to the long-standing Federal practice. Cases are tried as they come before the Court, and if it happens that the same jurors are called in successive cases of the same nature, we would never get anywhere with litigation if we were going to call in a whole new jury panel every time we had a new case. That is wholly impractical and, in my judgment, a visionary way to regard the matter. I can't hear you at any great length about that. You have your point and you have made it. I don't agree with it."

At least three of the jurors who sat on appellant's case were also jurors who returned a verdict of guilty in the Wollam case. As in appellant's case, the principal witness for the Government was Robert L. Kunzig. The theory of the law, and it is a logical one, is that where there are such successive similar cases, where the principal witnesses are the same, the jurors have formed an opinion relating to the verity of such witnesses which is prejudicial to the following cases. Thus it is stated in 160 A.L.R. on page 769 of the annotation commencing on 753 as follows:

"In other cases it has been held that a defendant in a criminal proceeding does not receive a fair and impartial trial where it appears that some of the members of the jury at his trial previously served on the jury at the trial of another defendant charged with a similar but independent offense, and witnesses who testified for the prosecution at the first trial were also used to establish the guilt of the defendant at the second trial. Some courts have reasoned further that, the credibility of such witnesses at the first trial having been sustained, particularly where the main defensive matter is the incredibility of such witnesses, an avowal of impartiality by the jurors will not remove their disqualification. It has been pointed out in this connection that it is impossible to determine by an investigation whether jurors have formed conclusions in the first case which disqualify them from sitting in the second, without opening the door to inquiries which will disclose the precise grounds upon which they reached the conclusion of guilt in the prior case."

The same question is covered in section 162 of 31 Am. Jur. where it is said on page 676:

"Jurors who have acted in a case involving an essential question of fact have been held incompetent to sit in a subsequent case where such question of fact is one of the material issues; this is on the ground that the juror is biased in that he has formed or expressed an opinion, and in some cases the rule has been adhered to even though the juror declared on his voir dire that he was unbiased."

SPECIFICATION OF ERROR No. 4

The verdict is contrary to the weight of the evidence.

To avoid being prolix and repetitive argument on this point and the one that follows will be treated in the summary.

SPECIFICATION OF ERROR No. 5

The verdict is not supported by substantial evidence.

ARGUMENT

As stated in the argument under other specifications herein, there is no substantial evidence on many essential points that could support a verdict and a judgment of guilt. There is one additional point, however, not otherwise covered, and that is that over the objection of the appellant, essential elements necessary for the prosecution's case were supported only by hearsay and incompetent testimony. Thus proof of the amended rules of the Committee and other integral parts of the prosecution's case are not made out by the authenticated published records of the Committee or sub-Committee, but by the oral testimony of Mr. Kunzig. Illustrating,

> "(By Mr. Carney) Q. Does the rule that you referred to require any particular number of persons to be on the subcommittee?
>
> Mr. Lenske: That is objected to as not the best evidence, your Honor.
>
> The Court: Overruled.
>
> A. Yes, sir. I personally was present when the rule was slightly amended and voted upon unanimously by the Committee to say that the Chairman would appoint subcommittees of three members of Congress, at least two of which had to be present. And at the hearings here in Portland there was a subcommittee of three appointed, of which two were present at all times."

The Best Evidence Rule was not followed and the verdict and judgment should have been set aside for this reason alone as well as the others herein specified.

SPECIFICATION OF ERROR No. 6

The Court erred in sustaining objections to questions addressed to the witness Robert L. Kunzig.

ARGUMENT

On pages 71 and 72 of part 2 of the Transcript of Proceedings appear the following cross-examination by appellant's counsel:

> "Q. Mr. Kunzig, the Court having permitted you to be qualified as an expert on this matter, can you testify what the effect has been on the jobs of persons who have been called before the Committee to testify in so far as their retention of their jobs after they have been called to testify?
>
> Mr. Luckey: If the Court please, I object to the question as being irrelevant.
>
> The Court: Objection sustained.
>
> Mr. Lenske: Q. Do you know of your own knowledge that in the majority of instances the persons called before the Velde Committee have as a result of so being called lost their employment?
>
> Mr. Luckey: If the Court please, the same objection.
>
> The Court: The same ruling. Sustained.
>
> Mr. Lenske: May I make an offer of proof on that?
>
> The Court: At some later time you may."

Clearly it was erroneous for the Court to prevent appellant from showing through the Committee's own expert that the prime purpose and effect of the Committee's interrogations was to cause the witnesses who were under suspicion of Communism, to lose their jobs. The record shows that appellant is one of those who did lose

his job promptly after appearing before the Velde Committee (Tr. of Rec. 14, 15).

On page 74 of part 2 of the Transcript of Proceedings appears the following cross-examination:

> "Q. Now after this subpoena was served upon Mr. Simpson was there any reasonable doubt in your mind or the mind of the Committee where Herbert Simpson worked?
>
> Mr. Luckey: If the Court please, I object to the question.
>
> The Court: Objection sustained."

This ruling was consistent with the Court's position that even though the Committee knew the answers to the questions, it still had the right to force those answers out of the mouth of appellant. Since the Court's premise was wrong its ruling amounted to prejudicial error.

On the same page of the Transcript of Proceedings we find the following (74, 75):

> "The Court: I think, Mr. Lenske, that I might just as well settle this matter once and for all. The Congress is not obliged, as I see the law, to seek its information in a manner that the witness might like, but may seek it from any source it chooses and to verify it in any manner it may see fit. Now the burden of your examination on this subject, as well as the previous one, was simply to the effect that there were other ways in which the Committee might have gotten the same information. Personally, I regard that as entirely immaterial. The Congress is not to be limited in its powers by what an individual witness might prefer in the matter of their inquiry. Accordingly, I must ask you now to desist from further inquiry long that general line.
>
> Mr. Lenske: May I except to the Court's remarks?

The Court: You may except.

Mr. Lenske: And note that exception. And also may I, if it please the Court, point out that I am trying to prove and want to prove the purpose of the Committee in examining the witness . . ."

On pages 77 and 78 we find the following cross-examination of Mr. Kunzig:

"Q. In determining on a proceeding with respect to obtaining information have the costs of obtaining information at any time been considered by the Committee?

Mr. Luckey: If the Court please, I fail to see the relevancy of that.

The Court: Wholly irrelevant. Sustained.

Mr. Lenske: Q. Mr. Kunzig, where conclusive information was readily available to the Committee at, let us say, a cost of six cents, and the same information could be obtained in another manner at a cost of $10,000—

The Court: Mr. Lenske, that matter is wholly irrelevant. Now, I have stated this several times. I want to be courteous and friendly about it, but I have repeatedly stated that this line of inquiry is irrelevant. Now you have your record on it, sir, and I think you should not persist in running counter to the ruling of the Court."

It must be borne in mind that Mr. Kunzig was ruled qualified by the Court as an expert relating to the Un-American Activities Committee of Congress. These questions were competent to test that expert witness. Further, they were relevant to ascertain the purpose of the Committee in its interrogation. If the Committee wanted to find out for information's sake the address, schooling, etc., of appellant and could do so with a letter of inquiry to the local FBI at the expenditure of only six cents, for airmail, that is one thing. But if it actually is not interested

in obtaining the information, but wishes to put on a witch-hunt show of information it already has, at a great expense, 2500 miles from Washington, D.C., that is another thing. In other words, whether the purpose of the Committee is interrogating appellant was for information for legislation could in some respects be ascertained by a forthright answer on the choice of a six cent method as against a $10,000 process.

It is the position of appellant that the Court should have admitted the testimony of Mr. Kunzig on these matters in view of the fact that it did admit his testimony as an expert relating to the Committee and Congressional matters pertaining to it.

SPECIFICATION OF ERROR No. 7

The Court erred in sustaining objections to questions addressed to the witness Joseph Santoiana.

ARGUMENT

Appellant called as a witness Joseph Santoiana, who was head of the FBI office in Portland. Following is his testimony:

> "By Mr. Lenske: Q. Mr. Santoiana, what is your occupation?
>
> A. I am Special Agent in Charge of the FBI office in Portland.
>
> Q. Were you such Special Agent on and prior to June 19th, 1954?
>
> A. I was prior to June, 1954.
>
> Q. For how long prior to June, 1954?
>
> Mr. Luckey: If the Court please, I would appre-

ciate some showing from Mr. Lenske of what he expects to prove by a witness from the Federal Bureau of Investigation concerning—

The Court: Yes, I recognize that there are some limitations. However, this particular question, I think, is not objectionable. How long were you?

A: I have been Agent in Charge of Portland since April 26th, 1954.

Mr. Lenske: Q. Prior to June 19th, 1954, did you as such Special Agent have any information regarding Herbert Simpson, the defendant in this case?

Mr. Luckey: If the Court please, I object to that.

The Court: Sustained.

Mr. Lenske: Q. Mr. Santoiana, did you on and prior to June 19th, 1954, consult with or were you consulted by any members or employees of the Velde Committee?

Mr. Luckey: If the Court please, I would object to that.

The Court: Sustained."

The rulings of the Court in sustaining the objections to the foregoing questions are consistent with the Court's ruling on the motion for a subpoena duces tecum and inspection of documents, etc., in the possession of the Committee. The Court denied the motion and ruled that even if the Committee had the information about appellant which was asked in the six questions, that would be irrelevant (Tr. of Proc. part 2, 3, 4).

Appellant tried to prove by the records of the Committee itself and through the testimony of the head of the FBI office in Portland that both agencies of the Government knew unqualifiedly the answers to each of the six questions that are involved in this case. The Court's

rulings in this respect were clearly in error and prevented appellant from producing an absolute defense to the charge against him. It must be borne in mind that the legitimate purpose of a congressional committee is to obtain information for legislation and not to prove a case. If the Committee knew through its own sources and through FBI sources, the answers to the questions involved, then it is obvious that the purpose of the Committee in interrogating appellant was not to obtain information for legislation and therefore was not pertinent.

Robert K. Carr, a professor of political science and a laywer made an exhaustive study and wrote a book entitled, The House Committee on Un-American Activities, and in it he said on page 458:

> "As long as the Committee exists the most reactionary forces in American life are sworn to seek to control it, and to use it as an instrument of witch-hunting and suppression."

SPECIFICATION OF ERROR No. 8

The Court erred in admitting testimony of the witness Robert L. Kunzig to which objections were made.

ARGUMENT

Appellant's counsel objected to any testimony being adduced by appellee on the ground of the insufficiency of the indictment under the law (Tr. of Proc. part 2 page 13). The indictment fails to state that the refusal of appellant to answer the questions was willful or wrongful or any equivalent thereof, or that appellant's refusal

to answer the questions was without just, proper or legal cause. In other words there was a complete void in an essential requirement of a valid indictment. Appellant will cite authorities on this point and cover it in greater detail later in this brief where the indictment is directly attacked.

On pages 15, 16 and 17 the Court permitted Mr. Kunzig to testify, over the objection of appellant's counsel, about the rules of the Committee and how the Committee was set up and what it was authorized to do, etc.

He was not identifying exhibits as such. He read from them and gave his own versions of the rules and the powers of the Committee. This was not only a violation of the best evidence rule, but permitted the jury to obtain a prejudicial concept that Mr. Kunzig spoke for the Congress or its Un-American Activities Committee and that what he said was the law.

Again on page 19 Mr. Kunzig testified over the objection of appellant's counsel as follows:

> "Q. Does the rule that you referred to require any particular number of persons to be on the subcommittee?
>
> Mr. Lenske: That is objected to as not the best evidence, your Honor.
>
> The Court: Overruled.
>
> A. Yes, sir. I personally was present when the rule was slightly amended and voted upon unanimously by the Committee to say that the Chairman would appoint subcommittees of three members of Congress, at least two of which had to be present. And at the hearings here in Portland there was a subcommittee of three appointed, of which two were present at all times."

How can an ordinary citizen defend himself against prejudicial testimony of this kind? If the Congress and its committees and subcommittees do not function under published rules and proceedings, but on the basis of hearsay oral testimony of one of its employees, then a private citizen has no chance, no matter how right he may be. The only competent testimony would have been a published rule of the Committee, duly certified and identified as such. The same is true of amendments to the rule and actions and appointments under such rule or amendment. The testimony adduced is wholly incompetent.

Therefore, the Government failed to adduce an integral portion of a necessary element in its prosecution and that alone was sufficient basis for allowance of appellant's motion to dismiss.

Again, the Court permitted Mr. Kunzig to testify over the objection of appellant's counsel (Tr. of Proc., part 2 page 20), what the purpose of the hearing at Portland was. Such testimony was not competent, was prejudicial and should not have been allowed.

Since all of the testimony adduced by the Government on the issue of pertinence was not competent testimony, the Government failed to make out even a prima facie case.

For the jury to have heard all of the incompetent testimony of Mr. Kunzig necessarily prejudiced the jury against appellant so that on the issues that the Court did confine to the jury appellant could not expect an unbiased verdict, but the error goes further than that. The Court's rulings and the Court's statements and the Court's

acceptance of the incompetent evidence led to error of the Court itself in its conclusion that the questions propounded to appellant were pertinent.

SPECIFICATION OF ERROR No. 9

The Court erred in all of the respects excepted to by appellant in relation to its charges to the jury.

The exceptions to the instructions of the Court appear on pages 132, 133 and 134 of the Transcript of Proceedings. The basic points raised by these exceptions are also set forth and raised in other specifications herein and therefore appellant does not feel it necessary to repeat under this exception the points otherwise covered.

SPECIFICATION OF ERROR No. 10

The Court erred in restricting the issues before the jury to the one of willful refusal to answer questions involved.

In other specifications appellant has pointed out that the question of pertinency and other issues were valid and substantial issues that should have been submitted to the jury if instructions favorable to appellant were not made upon them. Appellant will avoid repetition of the authorities and argument on this point.

SPECIFICATION OF ERROR No. 11

The Court erred in denying appellee's motion to dismiss the indictment.

ARGUMENT

A.

The indictment is insufficient in that it fails to state what is "the question under inquiry."

B.

The indictment states that appellant "was asked questions which were pertinent to the question under inquiry" but it does not state how or in what respect they were pertinent. In the absence of a statement of the question under inquiry the indictment does not and cannot state how and in what respect the questions asked of appellant are pertinent to the question under inquiry, but a showing of how and in what respect they are pertinent to the question under inquiry is a necessary ingredient of the indictment, particularly when the pertinence is not apparent on the face of the indictment. This is shown by the same line of reasoning as is found in U.S. v. John Reardon & Sons Co., 191 Fed. 454. In this case the Court states at page 456:

> "The fundamental rule, which never has been overthrown by the Supreme Court, although there are undoubtedly numerous expressions which seem to shake it, is that it is never sufficient to allege that an act is illegal, but you must allege something more which the Court can see on the face of the indictment is illegal if the facts are proven."

Further support for this position is found in Federal Practice Jurisdiction and Procedure, by William J. Hughes, Volume 9, on page 484:

"So all the material facts and circumstances embraced in the definition of the offense must be stated in the indictment, and the omission of any essential element cannot be supplied by intendment or implication."

Joyce on Indictments, Second Edition with Forms states on page 346:

"It is a general rule that mere legal conclusions should not be stated in an indictment as they neither add to nor detract from the indictment. And the want of necessary allegations in describing the offense cannot be supplied by averring conclusions of law."

The failure to state how and in what respect the questions asked of appellant were pertinent to the question under investigation cannot be excused on the ground that in the indictment the language of the charge is in the words of the statute. There is abundant authority on this:

Defending and Prosecuting Federal Criminal Cases, by Housel & Walser, Second Edition, page 343:

"Mr. Justice Gray, delivering the opinion of the Court, said: 'In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the Court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. U.S. v. Cruikshank, 92 U.S. 542; U.S. v. Simmons, 96 Ind. 360;

Commonwealth v. Clifford, 8 Cush (Mass.) 215; Commonwealth v. Bean, 11 Id. 414; Commonwealth v. Bean, 14 Gray (Mass.) 52; Commonwealth v. Filburn, 119 Mass. 297'."

In Robertson v. U.S., 168 Fed. 2d 294, the Court states that an indictment in the language of the statute is ordinarily sufficient, but where the statute itself omits an essential element of offense or includes it only by implication, the indictment should allege it directly and with certainty.

C.

The indictment is fatally defective in that it fails to allege that the refusal of appellant was willful, or wrongful, or unlawful.

In Sinclair v. United States, 279 U.S. 263. 49 S. Ct. 268, 73 L. Ed. 692, the defendant was convicted of violating Sec. 102, the predecessor of Sec. 192, the statute under which the instant appellant was indicted and convicted. It must be noted, however, that the indictment in the Sinclair Case used this language:

> "And that said Harry F. Sinclair—*unlawfully* did refuse to answer said questions.—" (Our emphasis)

The Supreme Court held that it was not mandatory for the indictment to specify "willfully"—that "unlawfully refused to answer" was sufficient.

In United States v. O'Connor, 135 F. Supp. 590, the District Judge summarizes the decisions as follows at page 593:

> "From the time of the decision in Sinclair in which the conviction was affirmed and where the indictment

did not allege willfullness but did allege that the defendant 'then and there *unlawfully* did refuse to answer said question' down to and including the decision in Quinn, the records of this Court indicate that 47 cases have been tried in which the indictments charged violation of Section 192 or its forerunner Section 102. In all of those cases, the indictments conformed to the language in Sinclair which the indictment in the pending case follows without in any instance specifying that the refusal to answer was 'Willful'."

Conceding *arguendo* that an indictment is sufficient if it omits "willfully" and substitutes therefor "unlawfully," and conceding that 47 or more indictments so phrased have been sustained, we respectfully submit that the indictment in the instant case is fatally defective in that it pleaded neither "willfully," "unlawfully," nor even "wrongfully," nor any equivalent thereof. The indictment made no averment in any manner whatsoever that the appellant's failure to answer the questions was without just, proper, or legal cause.

D.

The nature of the questions propounded was such that the refusal to answer them could not form the basis for an indictable offense.

This raises the point that on the face of the indictment the questions asked were innocuous and inconsequential. In other words under normal circumstances no great and powerful government would imprison a person for refusing to answer such simple, ordinary and quite meaningless questions. That is the situation as the questions appear in the indictment. It is not alleged that there was anything

wrongful or unlawful in the failure to answer those innocuous questions. The indictment does not even use the word "unlawful." It fails to give any idea of what Congress was investigating or how such questions could possibly be pertinent, excepting only for the bare use of the word "pertinent." Therefore, these questions and any possible answers to them must necessarily be taken on the face of the indictment as inconsequential and the actual indictment and conviction on such indictment almost frivolous. However, the inocuity of these questions as they appear in the indictment should not be confused with the ominousness of these same questions in the police guarded, publicized, crowded and tense hearings before the Committee with charges of Communism by "friendly" witnesses and with dire admonitions from the Committee counsel or the representative of the Committee.

Therefore the indictment itself, as based upon the simple questions involved, did not state an offense under Section 192 but as will be pointed out under Specification of Error No. 23, those same questions in the atmosphere of the Committee hearing fully justified the exercise of privilege under the Fifth Amendment.

SPECIFICATION OF ERROR No. 12

The Court erred in denying appellant's motion for acquittal.

ARGUMENT

This error of the Court follows from the numerous errors under the various specifications herein and will also be covered in the summary.

SPECIFICATION OF ERROR No. 13

Appellant was substantially prejudiced and deprived of a fair trial by reason of the obvious prejudice and partiality of the jury.

ARGUMENT

It has been previously pointed out in this brief that objection was made by appellant to the jury panel and that appellant's counsel wished to put specific questions to the prospective jurors relating to their participation in the Wollam case on the preceding day as jurors therein. The Court overruled appellant's objection. Under the law, as cited and as a matter of fact, the jury must necessarily have been prejudiced against appellant in view of the conviction in the Wollam case and the participation of some of the jurors in both cases. The numerous adverse rulings of the Court against appellant, many of which were in error, had a prejudicial effect upon the jury. The inclusion of the hearsay and incompetent testimony of Mr. Kunzig before the jury must have had a detrimental effect on appellant's cause.

SPECIFICATION OF ERROR No. 14

The Court erred in failing to find that the question of pertinence was a question for the jury.

ARGUMENT

In presenting argument on this point, it is to be noted that the indictment is insufficient in its allegations on

the matter of pertinence. Had there been sufficient allegation in the indictment on that issue, appellant was entitled to a trial by jury thereon. This is guaranteed to appellant under the Sixth Amendment to the United States Constitution:

"Amendment VI.

Criminal proceedings—Speedy trial—Trial by jury—Venue of Action—Compulsory process.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . ."

There is no valid reason why the issue of pertinence should be considered an exception to the guarantee of a jury trial under this portion of the constitution. It is true that in some cases the courts have held that the questions at issue were pertinent as a matter of law and in other cases the courts have held that questions in those cases were not pertinent as a matter of law. In the instant case, if there was any doubt that doubt should have clearly been resolved against the government. But in any event, at the least, appellant was entitled to have that issue submitted to the jury.

SPECIFICATION OF ERROR No. 15

The Court erred in failing to instruct the jury that it could determine the issue of pertinence from both the evidence and from the jury's own knowledge and experience.

ARGUMENT

The issue of pertinence depends partly upon the purpose of Congress in the creation of the Committee and the purpose of the Committee when making its interrogation. One method of ascertaining that purpose is in the recorded resolutions of Congress and the Committee. If we are to go beyond these resolutions to ascertain the purpose, then the jury may be presumed to be just as competent to judge the issue as any expert, such as the former counsel for the Committee. There are some fields of law in which a jury is entitled to form its conclusions upon its own knowledge and experience and in which it may utterly disregard expert testimony. An illustration is the determination by a jury of the reasonable value of professional services. The writer submits that the issue of the purpose of Congress and the Committee and the pertinence of the questions asked in a Congressional investigation lends itself peculiarly and specially to such jury determination.

SPECIFICATION OF ERROR No. 17

The Court erred in holding that appellant did not rightfully invoke his privilege under the Fifth Amendment.

ARGUMENT

Since the trial of this cause, the U.S. Supreme Court has spoken in several cases on the exercise of the Fifth Amendment. Likewise, the Circuit Court of Appeals for

the Ninth Circuit has expressed itself in at least three cases. Following are the citations:

Quinn v. U.S., 75 S. Ct. 668, 349 U.S. 155;
Emspak v. U.S., 75 S. Ct., 687, 349 U.S. 190;
Bart v. U.S., 75 S. Ct. 712, 349 U.S. 291;
Jackins v. U.S., 231 F 2d 405;
Starkovich v. U.S., 231 F 2d 441;
Fagerhaugh v. U.S., Case No. 14,638, U.S. Court of Appeals for the Ninth Circuit decided April 24, 1956.

The atmosphere in this case did not differ materially from that in the other cases. Radio, television and newspaper coverage were there in full regalia. The "friendly" witnesses were there testifying about Communist membership, officership and activities of the witnesses, appellant amongst them, who concluded, upon advice of counsel that "discretion was the better part of valor." The hearings took place in a U.S. Federal Court Room, adequately flanked by uniformed policemen.

As to what happened and what was said and done at the hearing, Mr. Kunzig, the Committee counsel and interrogator, was a competent and able witness. Following is some of his testimony given at the trial (Tr. of Proc. part 2, pages 23, 24, 25).

"Mr. Kunzig: A. The Committee was interested, sir in seeing whether there were any subversive activities, for example, in connection with labor unions, in connection with education as such, and the Committee also had information, and has had information many times, that there is a pattern of Communism infiltrating industry, and we were interested in seeing whether that pattern was carried out in this area; also here in this Portland area. For these reasons the Committee came here and called witnesses who we believed had

information and whom we had been informed by confidential investigators and confidential informants that these particular witnesses had information that would assist the Congress and that they could give information upon which we could then go back and report to the full Congress, which would aid the Congress in passing appropriate legislation.

Mr. Carney: Q. I will ask you whether the Committee had before it any information of this character you just testified to regarding the Defendant Herbert Simpson.

A. Yes sir. The Committee was in possession of confidential information that Mr. Simpson had knowledge, extensive knowledge, of Communist activities in this area, and that if subpoenaed he would testify and answer the questions asked by the Congress, and that he could greatly assist the Congress in giving information about Communist activities in this area. We also were interested in hearing what Mr. Simpson had to say, because we had information that Mr. Simpson had been for some time in association with suspected Communists in this area; that he knew them, he knew their activities, he knew what they were doing, and that he could give that information to the United States Congress. In connection therewith we had information, confidential information, that Mr. Simpson was a member of the Communist party. That was borne out, that information, by sworn public testimony right in this building when we were here, where a Mr. Canon and—I have forgotten the name of the other witness—Mr. Owen—those two gentlemen both testified under oath that they knew or had information that the defendant here today, Mr. Simpson, had been a member of the Communist party and I believe, if I recall correctly, even on the State Central Committee of the Communist Party here in Oregon. For those reasons which we felt to be vitally important reasons the Committee of the Congress subpoenaed Mr. Simpson to appear before the Committee and to give us, we hoped, vital information on Communist Activities in this area."

Further Mr. Kunzig testified in response to questions by Mr. Carney on direct examination, quoting from the Transcript of Proceedings, part 2, pages 32, 33, 34, 35, and 36 as follows:

"Mr. Carney: Q. What was the purpose of the inquiry of Mr. Herbert Simpson as to his residence?

A. We asked that question, sir, as we always do, to fix the identity of the witness. It is very important for the Committee to know who the witness is that is sitting before it. We may think that we know, but as happened very recently in Washington before another Committee, just in the last few months, by the questions they brought out that the wrong man was sitting before the Committee. We always ask for identification purposes that question, sir.

Mr. Carney: Q. I will ask you what was the purpose of the inquiry as to whether Herbert Simpson had been in the Armed Forces of the United States?

A. Well, I am sure it is very clear that the Committee is interested, perhaps more than anything else, in the question as to whether there is any infiltration of Communism in our Armed Forces. That is of tremendous importance. So we asked Mr. Simpson as to whether he had ever been in the Armed Forces of the United States. *We had information that he had been a member of the Communist Party*, and since there was sworn testimony that he had been a member of the Communist Party, we wished to find out and inquire whether he was in the Armed Forces of the United States, perhaps while he was a member of the Communist Party, at any time. And he just refused to answer whether he had ever been in the Armed Forces of the United States."

SPECIFICATION OF ERROR No. 18

The Court erred in failure to provide opportunity for the appellant to present testimony and argument on the claim of privilege by appellant and the right to refuse to make the answers under the amendments to the Constitution other than the Fifth Amendment, as well as the Fifth Amendment.

ARGUMENT

The Court ruled that the issue of privilege was one for the Court to determine and was not to be submitted to the jury. At no time did the Court allot a time to appellant for the presentation of either testimony or argument, directed to the Court itself and without the presence of the jury, on the issue of privilege, i.e., until the time for arguing the motion for a new trial. This was on January 31, 1955. At that time counsel for appellant specifically asked the Court for the setting of such time so that appellant could present the testimony of witnesses to the Court alone on that issue (Tr. of Proc., part 3, page 38).

SPECIFICATION OF ERROR No. 19

The Court erred in refusing to permit evidence to be adduced of the purpose of the Congressional Committee in asking the questions in issue of appellant.

ARGUMENT

Appellant has already shown from the proceedings for the subpoena duces tecum and in attempting cross-

examination of Mr. Kunzig that the Court had the information requested in the six questions but the Court held that proof of such knowledge was immaterial. It is the position of appellant that such proof itself would show that the purpose of the Committee was not to obtain knowledge but to either persecute or prosecute appellant.

SPECIFICATION OF ERROR No. 20

The Court erred in ruling that knowledge by the appellee of the answers to each of the specific questions involved was in itself a defense or was competent evidence towards a defense of the indictment.

ARGUMENT

The Court frustrated every attempt of appellant to show that the Committee had conclusive knowledge of the answers to each of the six questions set forth in the indictment. A hearing before a Congressional Committee is not a trial of a lawsuit. If the Committee already had the information requested in the six questions and was satisfied with the information then its purpose in asking those same questions of appellant could not have been to obtain information for purposes of legislation. The purpose could have been, and in this instance was, to publicize by radio, television and newspapers, the information that the Committee had so as to bring animosity upon appellant and so as to cause him to lose his job. Again it should be noted that this is different from adducing cumulative evidence at a trial where such accumulation is proper. Here it was improper.

SPECIFICATION OF ERROR No. 21

The Court erred in denying appellant's motion to grant appellant up to February 15, 1955, within which to amplify, amend and supplement appellant's motion for a new trial on the ground of newly discovered evidence.

ARGUMENT

The case was tried on January 20, 1955, and a verdict rendered that day. The Rule grants only five days within which to file a motion for new trial. On that date appellant filed such motion. Appellant ordered a transcript of the testimony from the Court reporter but on the date the motion for new trial was held, January 31, 1955, the testimony had not as yet been transcribed by the reporter. As a part of appellant's motion for a new trial appellant requested up to February 15, 1955, within which to amplify, amend and supplement appellant's motion. The request was a reasonable one and it was an abuse of the Court's discretion to deny it.

SPECIFICATION OF ERROR No. 22

The indictment is so vague and indefinite in its allegations that it is insufficient to allege an indictable offense against the United States.

This point will be argued along with the succeeding one.

SPECIFICATION OF ERROR No. 23

The indictment shows on its face that no indictable offense was committed against the United States by appellant.

(a) The indictment fails to state the subject of inquiry or the subject of the Congressional investigation and it fails to show the pertinence of the questions involved.

(b) The indictment fails to negate the fact that appellant asserted the privilege accorded to him under the Fifth Amendment to the United States Constitution, which assertion was duly made for valid reasons in good faith on advice of counsel.

(c) The indictment fails to state that the refusal of appellant to answer the questions involved was without just, proper or legal cause.

(d) The inquisitors acting for said Committee knew the answers to the questions propounded and said Committee did not propound said questions to gather information for legislative purpose but for extraneous purposes beyond the jurisdiction of Congress and/or said Committee.

(e) The nature of the questions propounded were such that the refusal to answer them could not form the basis for an indictable offense.

(f) There is no allegation in the indictment that the refusal to answer was willful, wrongful or unlawful.

ARGUMENT

Authorities and argument have already been presented on these points and appellant will not repeat them except to cite the additional case of Blau v. United States, 340 U.S. 159 (1950).

SPECIFICATION OF ERROR No. 24

The Court erred in denying appellant's motion for a new trial.

ARGUMENT

The Court should have allowed appellant's motion for a judgment of acquittal or, in the alternative, for a new trial on the basis of the various specifications herein set forth, and appellant will not repeat them under this specification but will add the following point.

SUPPLEMENTAL POINT

The Committee did not meet the strict standard set forth in the Emspak case making it mandatory upon the Committee to clearly, unqualifiedly overrule the claim of privilege based upon the Fifth Amendment and specifically direct the witness to answer the specific question.

In the words of this Court in Fagerhaugh v. U.S., supra:

> "Since the conviction and sentence of appellant by the lower court, the Supreme Court of the United States in Quinn v. United States, 349 U.S. 155, 1955, and in two cases decided the same day, Emspak v. United States, 349 U.S. 190, 1955, Bart v. United States, 349 U.S. 219, 1955, has held that when a witness before a committee refuses to answer a question and adequately indicates to the committee that his refusal to answer is based upon the privilege against self-incrimination, then in order to lay a foundation for a prosecution the committee must "overrule" the claim of privilege based upon the Fifth Amendment and specifically direct the witness to answer the question."

These requirements were not met in the instant case.

Appellant's testimony before the Committee appears in Exhibit 5.

It will be noted that in no instance did the Committee "overrule" the claim of privilege. It did direct an answer after the claim was first asserted. But in each instance, that direction was met with a restatement of the refusal and a reassertion of the privilege. There was never any statement by the Committee that the assertion or reassertion of the claim of privilege was "overruled." To use the language of the Court in Quinn v. U.S.:

> "Petitioner was never confronted with a clear-cut choice between compliance and non-compliance, between answering the question and risking prosecution for contempt."

In fact, the Committee Chairman, despite the request of its counsel to do so, refused to warn the appellant of contempt. This occurred following the question of whether appellant had ever attended high school. There was one suggestion by the Committee Chairman to appellant that he was placing himself "in a very good place for contempt action . . .", but this was not directed to a refusal to answer. It was directed to appellant's statement, "I would submit that my counsel is not able to cross examine any of the witnesses."

SUMMARY

There is one item in the record that distresses appellant's counsel and may give the Court ground to ignore all of the testimony of Robert L. Kunzig, the sole witness for the Government. Mr. Kunzig testified of his extensive

academic education, law education, experience as an advocate-general in the army, experience as a war crimes prosecutor after the war and his experience in handling hundreds and hundreds of cases as counsel for the Un-American Activities Committee (Tr. of Proc. part 2, page 61, 62). Yet we find in the record (Tr. of Proc. part 2, page 57), the following astounding admission on cross-examination:

> "Q. In Washington, D.C., is there a library that has the City Directory of Portland, Oregon, and the telephone books of Portland, Oregon?
> A. I don't know."

It is submitted that for want of any explanation or justification in the record for such colossal ignorance or evasion by the highly educated and experienced counsel for the Committee and the Government's sole witness, all of the testimony should be ignored and the case dismissed for want of a prima facie case.

It may be interesting to note that the Court's erroneous views of some of the important matters in this case were evident at the very beginning of the hearing. Before the opening statements were made and any testimony at all was adduced, the Court had formed its conclusion on the issue of pertinence and other important issues. It stated (Tr. of Proc., part 2, page 3):

> "My view of that is that whether or no the Committee had or had not any information of any value on those subjects is wholly immaterial. My view is that the Congressional Committee had the right to ask these questions to identify the witness, if nothing else, and to confirm any previous data they might have had. The questions referred to, in my judgment, were clearly pertinent questions, and even if the Con-

gressional Committee had had the whole detail about it in its possession, it would be wholly immaterial as far as this trial is concerned, because the Congressional Committee would have the right to make a sworn record of the information as distinguished from whatever other form they might have that data in."

There were numerous other errors committed by the Trial Court with which this brief does not deal in detail and the Appellate Court may well ask, how is it that so many errors were committed by such an able trial judge in such a small (one day, misdemeanor) case? Part of the answer is in the fact that not all the appellate law had been made on the issues in this case at the time this trial took place. Another part of the answer is in the inherent limitations of man. When the alleged Communist affiliations of appellant was touched upon during the trial the Court was quick in its effort to try to safeguard the rights of appellant by admonishing the jury: "In fairness to all concerned, the questions that are part of the indictment in this case are not concerned with these matters that we are not dealing with. I hope you will all keep that in mind" (Tr. of Proc., part 2, page 87). But the Court was unable to free itself from the hysteria and prejudice of the time, as appellant will shortly point out. The Court's generosity is apparent in that it allowed appellant to be out on bail although ". . . frankly it is very difficult for me to honestly say that I have any concern that there is any substantial question to be presented on appeal in these cases" (Tr. of Proc., part 3, page 69). Yet the Court could not free itself from the very tendency that it admonished the jury to guard against.

After the simple, frank and harmless statement of appellant (Tr. of Proc., part 3, pages 55 to 59), giving the Court all the answers to the six questions he had refused to give to the Committee and extolling the Roosevelt new deal era, the Court, in imposing sentence, said (Tr. of Proc., part 3, page 60), ". . . so I suggest to you, in response to your statement to me, that you give some thought about whether or not Communism is any better than Fascism." The Court further said (Tr. of Proc., part 3, page 62), ". . . this Government that you condemned or condemn . . ." The record is clear that appellant made no statement that could call forth such remarks leading to imposition of sentence. Thus the Court's sentence of imprisonment for ten months, compared to 30 days in the Fagerhaugh case, was apparently based partly upon something for which appellant was not convicted and for charges against the Government that he did not make.

In holding as a matter of law that appellant did not have the right to refuse to answer the questions on the ground of privilege the Court failed to apply the principle of law it correctly gave to the jury in the following instruction (Tr. of Proc., part 2, page 123):

> "Of course, one of the matters to be considered is the matter of the identity of the defendant. Of course, the Government has the burden of proving that the defendant is the same person who appeared before the Committee and who refused to answer as charged, and that must be proven beyond a reasonable doubt just as any other fact in the case."

The six questions asked of appellant at the Committee hearing were identifying questions and answers given could be used as the sole testimony to prove identification.

The record (Tr. of Proc., part 2, page 85), bears this out:

> "Mr. Lenske: Q. Now, after you inquired the name, would you make an inquiry as to identifying questions further about the individual?
>
> Mr. Kunzig: A. Always: as I have explained earlier today, the Committee desires to have clear identification of the person; where he lives, where he works, his education, and so forth and so on . . .
>
> Q. Those are asked as identifying questions?
>
> A. That is certainly one of the major purposes . . .
>
> Q. Does that mean that there might be another Herbert Simpson in Philadelphia who was a different person, and your purpose is to identify this person through these means as that particular Communist and not another person?
>
> A. Let me answer that this way; that many is the time—to use the name Herbert Simpson taken hypothetically—many is the time there turns out to be five Herbert Simpsons in Portland, and we get telephone calls from the other four say, 'Wait a minute. I am not the one that is in the Communist Party.' . . ."

Appellant has already shown in this brief that the Committee claimed appellant was a Communist; certainly neither the Committee nor the Court had the right to deny appellant the privilege granted him by the Fifth Amendment to remain silent on any information essential to a prosecution against him. See Bowers v. U.S. 202 F 2d 447.

In most cases the right to exercise privilege was liberally construed in favor of the witnesses. In the notable exception of Rogers vs. U.S., 340 U.S. 378, Justice Black, in his dissenting opinion concurred in by Justices Frankfurter and Douglas, says on page 378:

> ". . . today's holding creates this dilemma for witnesses: On the one hand, they risk imprisonment

> for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it."

Following the strict construction of the Rogers case, appellant claimed the right promptly. Since the majority of the Court has readopted the liberal construction giving the witness the benefit of the doubt in the Emspak and Quinn cases, appellant's right to exercise the privilege should now be clear and conclusive. See also Hoffman v. U.S., 341 U.S. 479.

In a case arising in appellant's district the trial judge admonishes witnesses that they must claim the privilege promptly when he states in U.S. v. Johnson, 76 F. Supp. 538 on pp. 540-1.

> "The privilege against self-incrimination is neither accorded to the passive resistant, nor the person who is ignorant of his rights, nor to one indifferent thereto. It is a fighting clause . . . Once he testifies as to part, he has waived his right . . ."

For emphasis appellant calls to the Court's attention once more the fact that the six questions are innocent and innocuous and form no basis for an indictment as they appear on the indictment issued against appellant in this case. Therefore the indictment should have been dismissed. On the other hand, however, those same questions asked in the atmosphere of the Committee hearing and in view of the testimony of previous witnesses against him, placed appellant on dangerous ground so as to fully

justify his exercise of the privilege under the Fifth Amendment.

Dated, Portland, Oregon

August 17, 1956

Respectfully submitted,

REUBEN G. LENSKE,
Attorney for Appellant.

No. 14743

United States
COURT OF APPEALS
for the Ninth Circuit

HERBERT SIMPSON, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF FOR THE APPELLEE

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No. 14743

United States
COURT OF APPEALS
for the Ninth Circuit

HERBERT SIMPSON, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF FOR THE APPELLEE

OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

Appellee adopts the jurisdictional references of appellant's brief.

QUESTIONS PRESENTED

1. Whether the indictment under 2 U.S.C.A., Sec. 192, charging refusal to answer questions at a hearing of a Subcommittee of the House of Representatives, stated an offense against the United States.

2. Whether the evidence was sufficient to support the verdict and judgment.

3. Whether the Court committed prejudicial error in its rulings upon the following procedural matters: Motion for subpoena duces tecum and inspection prior to trial, motion for continuance, empaneling the jury, rulings on evidence, motion to reopen after verdict, motion for new trial on ground of newly-discovered evidence.

4. Whether the trial court's instructions were fair and complete.

5. Whether the trial court properly found the questions pertinent and the refusals to answer not privileged.

STATUTES AND RULES INVOLVED

2 U.S.C.A., SEC. 192.

Federal Rules of Criminal Procedure:

Rule 16. Discovery and Inspection

> Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17. Subpoena

(c) *For Production of Documentary Evidence and of Objects.*

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT OF THE CASE

Appellant was convicted by jury trial of refusing to answer questions pertinent to questions under inquiry by a Subcommittee of the Un-American Activities Committee of the House of Representatives, United States Congress, on five counts of a six-count indictment. Count 3 was dismissed by the court. Appellant, at the trial below, asserted through counsel, *inter alia,* that his refusals had been privileged and the questions not pertinent to the subject under inquiry. Appellant has specified one supplemental specification and twenty-four specified alleged errors by the District Court, No. 16 of which appears abandoned. Many of the specifications appear duplicitous and for convenience and clarity of organization, appellee's brief discusses the errors alleged by appellant in other than numerical order.

ARGUMENT

I.

THE INDICTMENT WAS LEGALLY SUFFICIENT.

A. It is not necessary to expressly allege willfulness in the charge.

Fields v. U.S., D.C. Cir. 1947, 164 F.2d 97; cert den. 332 U.S. 851, 1948; *U.S. v. Deutch,* Case No. 13060, C.A. D.C., decided July 26, 1956; *Sinclair v. U.S.,* 279 U.S. 263, 1929; *Dennis v. U.S.,* D.C. Cir. 1948, 171 F.2d 986; aff. 339 U.S. 162, 1950.

B. It is not necessary to allege facts to negative possible defenses.

Eisler v. U.S., D.C. Cir. 1948, 170 F.2d 273; cert. den. 338 U.S. 883, 1949.

C. It is not necessary to allege the evidentiary facts showing pertinence, but allegation of pertinence was in fact made by reference to the appropriate Congressional action establishing the Committee and its scope of investigation, together with the particular pertinent questions charged.

Sinclair v U.S., supra.

D. Facts to support the offense defined by 2 U.S. C.A., Sec. 192 were alleged.

U.S. v. Josephson, 2 Cir. 1948, 165 F.2d 82; cert. den. 333 U.S. 838, 1948; *Morford v. U.S.,* D.C. Cir. 1949, 176 F.2d 54.

E. Elements of the offense are (1) appearance before an authorized committee of Congress; (2) refusal to answer questions pertinent to the subject under inquiry.

Townsend v. U.S., D.C. Cir. 1938, 95 F.2d 352, cert. den. 303 U.S. 664, 1938; *In re Chapman*, 166 U.S. 661, 1897.

The indictment alleges facts supporting the elements of the offense. It alleges that a duly authorized Subcommittee of the Committee on Un-American Activities of the House of Representatives was conducting hearings pursuant to Public Law 601, Sec. 121, 79th Congress, 2d Session (60 Stat. 828) and to House Resolution 5, 83d Congress. Consulting these references would show the appellant that Public Law 601, *supra*, established the Un-American Activities Committee and empowered it or its Subcommittees to hold hearings and require testimony of witnesses. Its scope of investigation was therein defined. House Resolution 5, 83d Congress, stated the rules for that Congress and reiterated the authority of the Committee enunciated by said Public Law 601.

The indictment further alleges that the appellant appeared before the Subcommittee on June 19, 1954 in the State and District of Oregon and was asked questions which were pertinent to the question then under inquiry, which questions are set out as separate counts, and alleges that the appellant refused to answer those pertinent questions.

Thus, the indictment alleges the authorized Committee and its statutory purpose, the appearance of the appellant and his refusal to answer questions pertinent to the subject under inquiry.

Appellant asserts that the indictment fails to allege

the "question under inquiry" and is thereby defective. Congress can be presumed to act lawfully and the reference in the indictment to the statute, stating these purposes, serves the double function of advising appellant of the authority of the Committee and the scope of its inquiry. No bill of particulars was sought; no surprise is claimed; no danger of double jeopardy exists. The appellant could have had no doubts as to the question under inquiry. *Morford v. U.S., supra.*

The appellant further asserts that the indictment does not show *how* the questions asked were pertinent to the question under inquiry. Appellee submits that appellant would require the pleading of purely evidentiary matters. The general rule is that indictment in the language of the statute is sufficient if thereby a defendant is fully advised of the charge. It cannot reasonably be, and is not in appellant's brief asserted, that the appellant was inadequately advised by the indictment of the charge against him. The statute defined the refusal to answer the pertinent questions as the offense—not *how* they were pertinent. The questions must be pertinet, but pertinence is a matter of law for determination by the Court.

Appellant further complains that the indictment is defective in not alleging that the appellant acted willfully, wrongfully or unlawfully. Willful refusal is not a necessary element in the second clause of 2 U.S.C.A., Sec. 192 under which this charge is brought. The court properly, by instruction, required showing of an intentional refusal. See *Chapman v. U.S.,* 8 App. D.C., 302 at 316, 319, 1895; *Sinclair v. U.S., supra,* at 299. But the ele-

ment of a deliberate act embraced in the word "refused" (to answer) involves the same intent amounting to deliberate, not inadvertent, failure, as required to show willfulness under the first clause of the Act. See *Fields v. U.S., supra; In re Chapman* and *U.S. v. Deutch, supra.*

Appellant finally asserts that the questions asked were innocuous and inconsequential and therefore not proper bases for indictment. He also asserts that questions were "ominous" in their setting. Identity of a witness, the crux of these questions, appears clearly pertinent to support such testimony as may be adduced from a witness. Only if the answers be shown privileged by the witness, a matter of defense, should refusal of a responsive answer be lawful. Appellant's assertion that the indictment should negative privilege is without support, as is attacking the indictment by alleging that factually the Committee knew the answers and asked the questions for other than a legislative purpose. See *Morford v. U.S., supra.*

II.

THE EVIDENCE SUPPORTS THE CHARGES, VERDICT AND THE JUDGMENT.

A. Pertinence of questions was a matter for the court, with or without receiving evidence.

Chapman v. U.S.; Fields v. U.S.; U.S. v. Josephson; Morford v. U.S.; Sinclair v. U.S., supra.

B. Appellant appeared at hearing, upon summons, to give testimony.

Tr. of Proc., part 2, page 21.

C. Having appeared, appellant refused to answer questions of the Committee pertinent to questions under inquiry.

Tr. of Proc., part 2, pages 22-43.

D. Refusal to answer the questions was deliberate and intentional and the appellant was specifically directed to answer the questions charged in the indictment.

Tr. of Proc., part 2, pages 22-43.

The questions were pertinent to the matter under inquiry. Pertinency was a question of law for the court to determine, with or without receiving evidence. Pertinency is established by the statutory and factual scope of the inquiry, itself, the fact that the questions were identifying in nature and by the testimony of the witness Robert L. Kunzig, counsel for the Committee, referred to above (C & D), who further elaborated for the benefit of the court. The record supports the Court's finding. *U.S. v. Josephson, supra.*

III.

PRIVILEGE WAS IMPROPERLY CLAIMED.

A. Counts 1 and 2 respectively charged appellant with refusing to answer questions:

> "Mr. Simpson, would you please state your residence?" and
>
> "Isn't it a fact that you live at 9115 North Geneva, Portland, Oregon?"

B. Counts 4 and 5 respectively charged refusal to answer the questions:

"Would you give this committee, please, a brief resume of your educational background?" and

"Now, Mr. Simpson, did you ever go to high school?"

C. Count 6 charged the appellant with refusing to answer to question:

"Were you ever in the armed forces of the United States?"

Amendment 1, United States Constitution, is not a proper basis for appellant to claim privilege herein. *Barsky v. U.S.*, D.C.. Cir. 1948, 167 F.2d 241; cert. den. 334 U.S. 843, 1948.

Amendments 9 and 10 are inapplicable as a defense. The rights retained by the people did not preclude Congressional investigations. *McGrain v. Daugherty,* 273 U.S. 135, 1927; *Sinclair v. U.S., supra.*

Amendment 14 is inapplicable. State action is not involved in this inquiry.

We now turn our attention to the claim of privilege under Amendment 5 of the Constitution, the only seriously-urged basis of privilege. The clause of the Fifth Amendment to the United States Constitution for consideration here, reads:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

We observe here that appellant was not appearing as a defendant in a criminal case. He was a witness before a Committee of the Congress. Appellee further observes that the constitutional provision has been enlarged by

interpretation to protect any witness before a court, grand jury or congressional committee who declines to answer any question which may tend to incriminate the witness, if the answer would form a link in the chain of evidence which would assist in prosecution for a federal crime. We further observe that the United States Supreme Court has repudiated the interpretation of those who submit that one claiming privilege acknowledges that he has committed an offense, (*Ullman v. U.S.*, 350 U.S. 422, 1956; *Emspak v. U.S.*, 349 U.S. 190, 1955) reasoning that the witness is entitled to invoke the privilege in an "ambiguous circumstance". We have also noted that this court, in *Jackins v. U.S.*, 9 Cir. 1956, 231 F.2d 405, approved and applied the language of *Hoffman v. U.S.*, 341 U.S. 479, 1951, in which the court said:

> "It was not '*perfectly clear*', from a careful consideration of all the circumstances in the case, that the witness [was] mistaken, and that the answers cannot '*possibly* have such tendency' to incriminate."

Despite these observations, we respectfully urge with all emphasis at our command, that the record before this court in this case supports the trial court's rulings concerning privilege.

Circumstances before the court were: a witness had been summoned to give testimony before the House Committe on Un-American Activities; he appeared after some witnesses—before others; the hearings were televised, but at appellant's request, he was not televised. Perhaps two witnesses—one before and one after the

swearing of the appellant—testified that appellant had been a communist (Tr. of Proc., part 2, page 80). The appellant, after stating his name, refused to answer any other of the identifying questions referred to in the indictment. He was specifically directed to answer each of those questions after he had claimed privilege. The record fails completely to afford any basis for the trial judge to affirmatively say that the answers could in any way tend to incriminate the witness.

It may be suggested that to show the court why the answers would incriminate, would require revealing the very fact which the privilege protects. We earnestly suggest that a showing of true tendency to incriminate is the burden of the defense—not of the court. It should not be incumbent upon the court to weave a speculative fabric of incrimination from a naked claim of privilege. The trial court is entitled to some help from the defense when the privilege is claimed and challenged, be it in the form of testimony or in some form which can then be examined. Though the burden in a criminal case does not shift, requirement of going forward with evidence may.

Witnesses, as such, are subject to compelled testimony throughout our governmental and judicial structure, absent recognized privilege. Only a defendant in a court, charged with crime, has a right to absolute silence. Other witnesses must, subject to penalty, give benefit of their knowledge of facts to the tribunal, *unless* privileged. One class of privilege is that against self-incrimination. The privilege is cherished for its just use, but its abuse should not be permitted. We can con-

cede that the privilege should be construed liberally for one asserting it, but along with the *right* to the assertion is the ever-present corresponding *duty* to support the claim. Herein, in Count 1, the appellant was asked to state his residence; there is nothing in the record to show that the witness feared incrimination from the answer. There is no basis in the record for application of *Starkovich v. U.S.,* 9 Cir. 1956, 231 F.2d 411, to the question here. The facts are distinguishable by the relationship of the Bellingham and Seattle residences attributed to Starkovich.

In Count 2, the appellant was asked if, in fact, he did not live at 9115 North Geneva, Portland, Oregon. Productive imagination to show how the answer could incriminate on this record is required, and if other than sham basis exists for its assertion, the defense should supply, during the trial, some basis for the claim.

Count 4 involved refusal to answer a question asking for a resumé of the witness' educational background. Such a question is asked routinely of witnesses in judicial proceedings daily. Certainly, the tribunal was entitled to know something of the witness, to evaluate his testimony and to identify him. The record fails to support affirmatively the challenged claim of privilege. The conviction on this count should also stand.

In Count 5, the appellant was asked if he ever attended high school. Appellant's brief acknowledged that this and other questions were innocuous, but contends that in their setting, they were "ominous". How, he does not show, other than to attack the objectives of the

Committee and their so-called "dire admonitions", which were only directions to answer.

Count 6 involved refusal to answer whether appellant had ever been in the armed services of the United States or not. This question is also identifying and pertinent. On its face, it is innocuous; it is unlikely to be otherwise in fact. In face of the challenged claim of privilege, no showing has been made to support the claim. We suggest that if any count before the court therein is vulnerable, it is this count because of the testimony of Mr. Kunzig cited on page 34 of appellant's brief. However, these matters cannot be considered in a vacuum. The trial court ruled that under all the circumstances, this claim of privilege (and that in all counts other than Count 3) was not justified. At the time of sentence, the record shows that it was demonstrated by the appellant that fear of self-incrimination did not motivate him in refusal to answer the respective questions and that the claim of privilege was an abuse and sham. On page 55, part 3, Transcript of Proceedings, the appellant addressed the court as follows:

> "My name is Herbert Simpson. I have lived in Portland 33 years. I have a family here; been married 10 years and just had a six weeks old son, December 18. We are buying a home here. We live at 9115 North Geneva Avenue.
>
> "I went to school here, went to Ockley Green Elementary School and to Jefferson High School, where I graduated. That is the extent of my formal education.
>
> "I went to school during the period of the Roosevelt New Deal, at a time when the political climate of the nation was full of the feeling of

growth and democracy. The New Deal was a building period of our county. It was during that time that the trade unions of our country came into their own. I feel I am a product of the great upsurge of democracy during the depression.

"When it became necessary, Your Honor, during World War II, the war against Hitlerism and Fascism, I volunteered for service in the Navy. After I was discharged from the Navy, I went to work in a shipyard and worked as an electrician, even though my background was one better fitted for clerical work. I felt I could serve my country best in the shipyards.

". . . My last steady employment, permanent employment, was when I was working at the United Truck Lines where I was subpoenaed by Mr. Meyer last May . . ."

Appellant clearly shows, as he did by parroting numerous constitutional amendments, that he was opposed to the existence of the Committee and used this method to frustrate it. There was some indication that the appellant was uncertain as to the consequence of the answers which might, in his judgment, constitute a waiver as to directly incriminating questions which might follow. He was mistaken if he claims that answers to these questions would waive dangerous ones. *Starkovich v. U.S., supra.* The fact remains that on the whole record, it appears that the appellant asserted the privilege without, in fact, fearing or having reason to apprehend that the answers to these questions, pertinent for identity of him *as a witness,* would tend to incriminate him. *Rogers v. U.S.,* 340 U.S. 367, 1951.

Appellant took it upon himself to resist what he chooses to assert was a "witch hunting" committee, and

abused the privilege provided by the Constitution, to frustrate the lawfully-constituted Committee of the Congress. Other questions conceivably could have required answers tending to incriminate appellant, and he could, perhaps, have justified, as to later questions, invoking his privilege. Not so, we submit, was his lawful choice to refuse answers to the innocuous questions here charged. *U.S. v. Josephson, supra.*

What the trial court may require of the witness claiming challenged privilege on the basis of self-incrimination is, of course, perplexing, but perplexing questions are not unique to the law. The trial court is best able to evaluate, from all the circumstances, the good faith of the assertion of the privilege. If the questions themselves are clearly incriminatory, the privilege is clear. If the questions are innocuous, as in this case, the court is entitled to have some rational demonstration amounting to "real danger v. imaginary possibility" test applied. *Brown v. Walker,* 161 U.S. 591, 1896. The witness, upon prosecution for refusal after claim of privilege, may, at trial, develop the basis of his claim by testimony of other witnesses or documents showing the setting, if he does not himself choose to take the stand. He may, through his counsel, develop the nature of the facts on which the witness bases his claim, without revealing the facts themselves. To require nothing of a witness in such circumstances as these is to make every man his own judge of his right to silence and to leave a trial judge without any standard to compel testimony of a recalcitrant witness. In this instance, the tribunal was a Congressional Committee. Throughout

the cases involving similar refusals to respond to questions on the basis of self-incrimination, the researcher will find co-mingled reference to cases involving Congressional Committees, grand juries and courts. If a special standard is to be applied to Congressional Committees, we suggest that a clear enunciation by the courts is required in order that dangerous precedent may be avoided which may frustrate the established power to effectively compel testimony in other forums. Such dangerous precedent is unnecessary to do justice here. Appellee submits that historically the drafters of the Fifth Amendment would have made any special standard applicable to a witness before a Congressional Committee as favorable as possible to the Congress for its inquiry.

IV.

COURT DID NOT ERR IN ITS RULINGS ON PROCEDURAL MATTERS.

A. Motion for Subpoena Duces Tecum and for Inspection Prior to Trial Was Properly Denied.

Appellant filed a motion for subpoena duces tecum and inspection prior to trial (Tr. of Rec. 33) which sought the production of:

> ". . . all papers, documents, notes, reports and summary of information in their hands or under their control or which comprise a part of the records of the Un-American Activities Committee of the Congress, which contain any information pertaining to defendant, that was in the possession of said witnesses and/or said Committee, on or prior to June 19, 1954 and especially any information about the residence, education, armed service record and employment of defendant and any infor-

mation about the political affiliation, meetings and activities of defendant."

Appellant's motion was properly denied, whether it be considered a motion for discovery and inspection under Rule 16 of the Federal Rules of Criminal Procedure or a motion for a subpoena duces tecum and inspection prior to trial under Rule 17(c) of the Federal Rules of Criminal Procedure.

1. *Rule 16 Inapplicable.*

Rule 16 provides for a very limited right of discovery in criminal cases. The four requirements for pretrial discovery under Rule 16 are set forth in *U.S. v. Mesarosh,* D.C. Penn. 1952, 13 F.R.D. 180:

"(1) The evidence must consist of tangible objects, i.e., books, papers, documents, etc.

"(2) These objects must belong to defendants or have been obtained from the defendants or from others by seizure or by process.

"(3) There must be a showing that the objects sought are material to the preparation of the defense.

"(4) There must be a showing that the request is reasonable."

Appellant has failed to fulfill these requirements, particularly as no showing was made that the objects which he sought were taken from him or from others by seizure or by process. *U.S. v. Black,* D.C. Ind. 1946, 6 F.R.D. 270; *U.S. v. Rosenberg,* D.C. N.Y. 1950, 10 F.R.D. 521; *U.S. v. Chandler,* D.C. Mass. 1947, 7 F.R.D. 356; *U.S. v. Pete,* D.C. D.C. 1953, 111 F.Supp. 292.

2. *Rule 17(c) does not Provide for Discovery.*

Rule 17(c) of the Federal Rules of Criminal Procedure provides for the usual subpoena duces tecum for the production of evidence. In addition, it provides that the court may, in its discretion, direct that the subpoena duces tecum be returned prior to trial and may permit the documents and objects subpoenaed to be inspected by the defendant prior to trial. The limited right of pretrial discovery provided by Rule 16 has not been enlarged by any provision of Rule 17(c). *U.S. v. Carter,* D.C. D.C. 1954, 15 F.R.D. 367.

The distinction between these rules has been drawn by Judge Holtzoff in *U.S. v. Maryland & Virginia Milk Producers Assn.,* D.C. D.C. 1949, 9 F.R.D. 509:

> "(1) The purpose of this provision is a limited one. It is to make it possible to require the production before the trial of documents subpoenaed for use at the trial. Its purpose is merely to shorten the trial. It is not intended as a discovery provision.
>
> "(2) In this case the proposed subpoena duces tecum is not intended to be used to secure evidence to be introduced at the trial, but is intended to be employed as a broad discovery for the purpose of inspecting all the documentary evidence in possession of the Government and which the Government intends to use at the trial.
>
> "(3) It is well settled that in a criminal case, unlike a civil action, such a right of broad discovery does not exist. As I said before, Rule 17(c) was not intended to be a discovery provision, but merely a means to make a subpoena duces tecum returnable prior to the trial in order

> that time at the trial may be saved while documents are being examined and inspected."

In *Bowman Dairy Co. v. U.S.*, 341 U.S. 214, 1951, which is a leading case on that subject, these rules are distinguished:

> "It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 provided for the usual subpoena ad testificandum and duces tecum, which may be issued by the Clerk, with the provision that the Court may direct that the materials designated in the subpoena duces tecum to be produced at a specified time and place for inspection by the defendant. *Rule 17(c) was not intended to provide an additional means of discovery.* Its chief provision was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." (Emphasis added.)

3. *No showing of "Good Cause" under Rule 17(c).*

Under the rule stated in the *Bowman Dairy case, supra,* appellant was required to show good cause before the trial court should exercise its discretion to grant an order for production and inspection of documents before trial. The requirements of "good cause" are set forth in *U.S. v. Cohen,* D.C. N.Y. 1953, 15 F.R.D. 269:

> "Documents which are obtainable, if at all, under rule 17(c) may be obtained from the Government under conditions indicated in the discussion in the Bowman opinion which have been well codified by Judge Weinfeld in United States v. Iozia, D.C. S.D. N.Y., 13 F.R.D. 335, 338, as follows:
>
> '(1) *That the documents are evidentiary and relevant;*

'(2) That they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence;

'(3) That the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial;

'(4) That the application is made in good faith and is *not intended as a general fishing expedition.*' " (Emphasis supplied.)

A motion to inspect under Rule 17(c) is limited to those documents which are evidentiary and relevant. The reason for this rule is explained by Judge Holtzoff in *U.S. v. Carter, supra:*

> "Manifestly a subpoena duces tecum may be used only for the production of documents that are admissible in evidence, and in addition, at most, for the production of documents that may be used for the purpose of impeaching a witness called by the opposing party. A subpoena duces tecum may not be used for the purpose of discovery, either to ascertain the existence of documentary evidence, or to pry into the case of the prosecution. That this was the intention of the draftsmen of the rules is indicated by the Committee notes to the Second Preliminary Draft of the Rules."

The documents, reports, summaries and work sheets sought by appellant were not evidentiary, relevant or material to his defense. At the time of the motion, the appellant contended that the documents and summaries sought were material in that they would show that the Congressional Committee knew the answers to the questions at the time of the Congressional hearing and that such knowledge by the Committee, its counsel and in-

vestigators, should constitute a defense to the present charge. Whether the Committee, its counsel or investigators had any information or evidence with respect to the answers to the questions put to the appellant is wholly immaterial. The Committee would still have the right to ask the questions to identify the witness. It would have a right to verify and confirm any data or information which it had previously secured. It would be the Committee's duty to convert its unconfirmed data and information into a sworn record for use by the Congress. Because the documents, summaries and reports if any which the Committee had before them at the time of the interrogation of the appellant, were not material to appellant's defense or admissible in evidence in this case for any demonstrated purpose, they cannot be reached by subpoena duces tecum or inspected prior to trial.

Appellant also contends that the documents and reports sought were material in that they would show that "appellant had good grounds under the Fifth Amendment to refuse to answer the questions propounded". No showing was made, however, by the appellant, that the appellant knew, at the time of the Congressional hearing, of the existence or contents of the documents and reports before the Committee, nor was any showing made that the specific information in these documents and reports would have provided appellant with good grounds, under the Fifth Amendment, to refuse to answer the questions propounded, or that they were not simply work papers. Information in the records and files of the Committee, the contents of

which were unknown to the appellant and which had not been brought to his attention directly or by publication, could not possibly become material evidence necessary for appellant's defense in refusing to answer these questions on the grounds of the Fifth Amendment.

In *Morford v. U.S., supra,* defendant was charged with violation of 2 U.S.C.A., Sec. 192, and filed a similar motion for subpoena duces tecum, which was summarily disposed of as follows:

> "We think it unnecessary to prolong this opinion by discussing in detail the appellant's argument . . . that it was error to refuse him access to the confidential files of the Committee other than the material therefrom adduced by the Government in support of pertinency; . . . Suffice it to say that we have examined these contentions with care and have concluded that the trial court did not err in any of those respects."

The broad general demand for all reports, documents and records in possession of the Committee marks the motion for subpoena duces tecum as a fishing expedition and attempt to rummage through the Committee's file for purposes outside of the case.

The documents called for by a subpoena duces tecum must be specified with reasonable particularity. *In re Eastman Kodak Co.,* D.C. N.Y. 1947, 7 F.R.D. 760. It appears clearly within the discretion of the court to deny appellant's dragnet motion to bring in all of the books, papers, documents and records of the Committee. *U.S. v. Giglio,* D.C. N.Y. 1954, 16 F.R.D. 268.

4. *The Pretrial Inspection Provision of Rule 17(c) Rests within the Sound Discretion of the Trial Court.*

Rule 17(c) provides that the court "*may*" direct the production of books, etc. before trial and "*may*" order their inspection prior to trial. It follows that the question whether the materials are to be produced and inspected prior to trial rests within the sound discretion of the court. *U.S. v. Mesarosh, supra; U.S. v. Schneiderman,* D.C. Calif. 1952, 104 F. Supp. 405; *Remmer v. U.S.,* 9 Cir. 1953, 205 F.2d 277.

In the *Bowman Dairy* case, *supra,* the trial court, in the exercise of its discretionary authority under Rule 17(c), granted pretrial inspection of certain documents, the court having first found the materials to be evidentiary. In *Remmer v. U.S., supra,* this court demonstrated that the *Bowman* case does not afford a defendant pretrial inspection as a matter of right, but that the matter still remains within the sound discretion of the trial court:

> "The Supreme Court in that case held that the trial court had the power to order the Government to produce certain documents. It did not hold that a refusal to grant the motion to produce would have been an abuse of discretion."

B. Appellant's Motion for Continuance Was Properly Denied.

On January 13, 1955, appellant filed "Motion for Subpoena Duces Tecum and Inspection or for Dismissal or Postponement" (Tr. of Rec. 33). With respect to postponement, this motion requested:

> "6. That in the event that the court fails to dismiss the indictment herein, the trial of said cause be postponed and continued until such time as the witnesses and evidence sought in this motion be produced and made available in court." (Tr. of Rec. 34.)

The motion for subpoena duces tecum and inspection was heard January 19, 1955, together with similar motions in the *Donald M. Wollam* and *John Rodgers MacKenzie* cases set for consecutive trial at same time and place. The court denied the motion in the *Wollam* case, which was the first case set for trial, and indicated that the similar motions in the present case and the *MacKenzie* case would also be denied, though final ruling thereupon was held in abeyance pending any developments which might occur during the trial of the *Wollam* case (Tr. of Proc., part 1, page 9). On January 20, 1955, after the jury was empaneled in the present case, the court denied the motion for subpoena duces tecum and inspection (Tr. of Proc., part 2, page 3), whereupon appellant moved that the case be continued and stated the grounds to be:

> "I am unprepared at this time to present an adequate defense for the defendant. I am unprepared with necessary witnesses on behalf of the defendant. Part of that reason is that I had hoped and depended on the fact that evidence might be presented through the witnesses that we sought to subpoena in my motion for a subpoena duces tecum, and I took steps toward that end in due time. I believe that the original motion was filed about a month ago. The supplemental motion was filed considerably later, but both were under consideration until Wednesday morning, which is yesterday.

> "For want of evidence that I would hope to present as a result of that motion, it is necessary for me to take steps to take depositions, some in Washington, D. C., and it is necessary for me to subpoena other witnesses. Some of them may be available in this community, but nevertheless I have not had the time or the opportunity in view of the late ruling on my motion to either take the depositions or subpoena the necessary witnesses." (Tr. of Proc., part 2, pages 5 and 6).

Appellant's motion for continuance to secure additional witnesses and evidence was properly denied in that appellant failed to support the motion with a showing by affidavit or otherwise, with respect to:

1. The name, identity and location of proposed witnesses.
2. Why the witnesses have not been produced for trial.
3. The diligence of appellant in taking necessary steps to secure the proposed witnesses.
4. A definite statement of the specific nature or purport of the proposed testimony.
5. That the proposed testimony would be admissible, material and relevant to the defense.

The failure to show the name, identity and location of the proposed witnesses was alone sufficient ground to deny continuance. *U.S. v. Kennedy,* D.C. Minn. 1930, 45 F.2d 433; *Farmer v. U.S.* 4 Cir. 1950, 183 F.2d 328. At no time did appellant identify the witnesses sought. The record merely shows some broad statements about un-named possible witnesses in Washington, D. C. and "in this community". (Tr. of Proc., part 2, page 6).

No showing was made of due diligence by appellant's taking proper steps to secure the presence of these

witnesses at the time of trial, nor was any explanation made why the witnesses were not present at trial time with the other defense witnesses. Such failure was adequate ground for denying the motion. *Johnson v. U.S.,* 8 Cir. 1929, 32 F.2d 127; *Chastain et al v. U.S.,* 5 Cir. 1943, 138 F.2d 413. Appellant was not surprised by the court's ruling upon the motion for subpoena duces tecum and inspection. On January 12, 1955, appellant's counsel was advised that the motion would be opposed. (Tr. of Rec. 37). On January 19, the court clearly indicated that the motion would probably be denied. (Tr. of Proc., part 1, page 9). Appellant apparently attempted to put the court in the position where it would have to either grant the motion for subpoena duces tecum and inspection or grant a continuance. Certainly diligence was not exercised in failing to take any steps to secure the proposed witnesses in anticipation of what the court's ruling might be on the motion for subpoena duces tecum. Appellant's hope that the court would grant the motion for subpoena duces tecum was not a sufficient excuse for his lack of diligence in securing the other witnesses.

Failure of appellant to show specific facts to which the absent witnesses would testify and that such testimony was material to the defense, likewise justified denial of continuance. *Babb et al v. U.S.,* 5 Cir. 1954, 210 F.2d 473; *Alaska Pacific Fisheries v. U.S.,* 9 Cir. 1921, 269 F. 778; *Godsey v. U.S.,* 6 Cir. 1927, 17 F.2d 877. As pointed out in the *Babb* case, "a motion for continuance based on the absence of a witness should be specific and state substantially what the witness

would testify to if present, and show wherein the absent witness' evidence would be material and competent." No statement was made by appellant as to the nature of the testimony expected from the proposed witnesses. The appellant merely stated that the additional witnesses were needed to supply evidence which appellant might otherwise have secured had the subpoena duces tecum been granted. It will be recalled that appellant sought the records of the Committee in order to show that the Committee already knew the answers to the questions propounded. For the reasons stated previously, such evidence was wholly immaterial to the issues in this case. Appellant now contends that, in addition, witnesses were needed to show that the purpose of the Committee was not legislative but to cause appellant to lose his job and be subject to adverse publicity. Similar evidence was held inadmissible in *Morford v. U.S., supra,* in which appellant sought to prove that the sole purpose of the Committee was to add the name of the appellant to its "black list". In affirming the exclusion of such evidence as being immaterial, the court held:

> "This assignment of error charges the Committee was not acting in furtherance of a legislative purpose in seeking the information which Morford refused to give. It is held, however, that a legitimate legislative purpose is presumed when the general subject of investigation is one concerning which Congress can legislate, and when the information sought would materially aid its consideration. McGrain v. Daugherty, 273 U.S. 135, 177-178, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1. That presumption arises here, and it cannot be rebutted by impugning the motives of individual members of the Committee."

Appellant's motion for continuance was renewed at the end of the government's case. The grounds assigned were the same as those which have been discussed previously (Tr. of Proc., part 2, pages 108-110). In particular, we observe that the appellant was unable to furnish the court with the name of any proposed witness. In addition, appellant contended that he desired to produce testimony to show that the purpose of the Committee was not legislative, which evidence appellee reasserts was immaterial. See *Morford v. U.S. supra.*

A motion for continuance is directed to the sound discretion of the trial court, whose ruling should not be disturbed on appeal in the absence of a clear showing of abuse. *Kramer v. U.S.,* 9 Cir. 1948, 166 F.2d 515; *Isaacs v. U.S.,* 159 U.S. 487, 1895; *Remmer v. U.S., supra.*

C. Jury Properly Empaneled and Qualified.

In Specification of Error No. 3, appellant argues that the court erred in permitting the trial to continue before the jury empaneled. The record is not clear as to whether appellant is objecting to the specific jury which heard this case, or whether his objection is to the entire array from which the jury was selected. For this reason, it becomes questionable as to whether appellant has properly raised the issue as to the competency of the jury which returned the verdict in the present case in a manner which can be considered by the court.

Appellant's objection to the array is without merit. In the case of *Cwach v. U.S.,* 8 Cir. 1954, 212 F.2d 520, which involved an alleged violation of the Mann Act,

the defendants assigned as error the trial court's refusal to dismiss the jury panel because some of its members had previously passed on the credibility of the prosecuting witness in a case involving other defendants. It appeared that the prosecuting witness had testified in a Mann Act case previously and that two of the jurors who sat in that previous case were called in the *Cwach* case. The defendants used six of the ten preemptory challenges allowed and struck one of these two jurors, leaving the other on the jury. The court stated on page 529:

> "There is no showing that this juror entertained any preconceived convictions as to the credibility of witness Jordell which might have been unfavorable to the defendants. The existence of prejudice cannot be presumed. In *Haussener* v. *U.S.*, 8 Cir. 1925, 4 F.2d 884, a case involving prosecutions under the National Prohibition Act, it was held that the fact that five of the jurors had previously sat in similar cases against other defendants, wherein the same government witnesses testified, was insufficient to disqualify them absent a showing that their attitude was such as to preclude a fair and impartial trial. No attempt having been made to show the juror in this case was biased or prejudiced by reason of having heard Gloria Jordell testify previously, the ruling of the trial Court is sustained."

If, on the other hand, appellant is objecting to the jury selected in the case under consideration, his objection is equally without merit. The record shows that it was the trial court's opinion that he fully, and in very emphatic terms, asked the jurors as to whether their participation in the earlier case would affect their deliberation in the present case (Tr. of Proc., part 3, page 16). Since appellant has not included in the record the

voir dire examination and instruction to the jurors prior to their being sworn, there is not anything in the present record before the court which shows that the jurors were not properly instructed in the ordinary and usual manner, that their verdict should be based on the evidence in the present case and not affected by the case tried on the previous day. The presumption that the usual instructions were given is strengthened by the references to them in the record. (Tr. of Proc., part 3, pages 16 and 17).

In the case of *Belvin v. U.S.*, 4 Cir. 1926, 12 F.2d 548, which was a case involving the alleged conspiracy to violate the provisions of the National Prohibition Act, the defendants moved the court to exclude eleven of the jurors subsequently empaneled to try the case, on the ground that they had served in a number of other cases involving violations of the National Prohibition Act in which the witnesses relied on by the government had testified and in which the credibility of those witnesses was necessarily involved. The court, on page 550, stated:

> "The motion to exclude the 11 jurors who had served in other cases was properly denied. The trial judge interrogated them and determined that they were impartial jurors. The exact point had been decided adversely to the contention of defendants by the Circuit Court of Appeals of the Sixth and Eighth Circuits. (citing cases)"

There is no presumption either in fact or in law that the mere sitting upon a similar case gives rise to an actual or implied bias in the mind of a juror. *Cwach v. U.S., supra; Haussener v. U.S., supra; Ramos v. U.S.*, 1

Cir 1926, 12 F.2d 761; Annotation 160 A.L.R. 753 at page 756.

In the case of *Wilkes v. U.S.*, 6 Cir. 1923, 291 F. 988, which was a case involving alleged conspiracy to violate the Reed Amendment, the court stated on page 990:

> "Some of the jurors in attendance upon the session had been present in court during the trial of other cases of the general group referred to, and some had sat in some of the other cases. Defendants moved to dismiss the array, and for a new array of jurors, for the reasons just stated, coupled with the proposition that the evidence being similar to the evidence in this case such jurors had passed upon the credit or lack of credit of Taylor and his wife, and had formed or expressed opinions as to the whole series of cases growing out of the indictments in question. Whether or not the practice of moving to dismiss the array was a proper one, it was not error to deny the motion. There was under it no showing of fact that the jurors had either formed or expressed opinions as to the merits of the instant case. There is no presumption of law that they did do so, nor any presumption that a juror who has heard the evidence in one of the cases, or even sat in one or more cases, will be other than impartial in another case merely because it is of the same general type. Each case involved differing conditions and questions of credibility on the part usually of different defendants, and the credibility of both Taylor and his wife was required to be weighed not only upon the facts of the individual case, but as between these witnesses and different defendants."

Before the defendants can claim prejudicial error on the part of the court in keeping certain jurors in the case, it must be established that the defendant exhausted all of his preemptory challenges. There is no showing in

this record to that effect. *Hayes v. Missouri,* 120 U.S. 68, 1887, at p. 70; *Hopt v. Utah,* 120 U.S. 430, 1887, at p. 436; *Spies v. Illinois,* 123 U.S. 131, 1887, at p. 168; *State v. Humphrey,* 63 Or. 540, 128 P. 824, 1912; *State v. Sack,* 62 Or. Adv. Sheets, p. 1271, 1956.

The burden of showing that the defendant was prejudiced by the jury as constituted or by the panel or array is upon the defendant-appellant. *Reynolds v. U.S.,* 98 U.S. 145, 1878; *U.S. v. Dennis,* 2 Cir. 1950, 183 F.2d 201; aff. 341 U.S. 494, 1951; *U.S. v. Handy,* D.C. Penn. 1955, 130 F. Supp. 270; aff. 3 Cir. 1955, 224 F.2d 504.

The trial court determined that there was no error (Tr. of Proc., part 3, page 16) and this determination should not be set aside without a showing of abuse of discretion. No such showing has been made. *Kempe v. U.S.,* 8 Cir. 1947, 160 F.2d 406; *Robinson v. U.S.,* 6 Cir. 1944, 144 F.2d 392; *U.S. v. Chapman,* 10 Cir. 1947, 158 F.2d 417; *Bratcher v. U.S.,* 4 Cir. 1945, 149 F.2d 742.

The attention of the court is respectfully invited to that portion of 31 Am. Jur., Jury, Sec. 162, page 676, immediately following the quotation set forth by counsel in this brief on page 13, which states:

> "This rule has been applied where one of the parties was the same in both cases. There is no error in refusing to sustain such a challenge where the record is deficient in bringing out the identity of the issues, and the mere suggestion of counsel is not sufficient proof of such fact."

It is submitted that the retention of the jury panel and the selection of the jury in this case was without error.

D. Court did not Err in the Admission or Rejection of Evidence.

In alleging error as to the admission and rejection of evidence, appellant has not complied with Rule 18(2)(d) of this court. The specifications of error fail to state (1) the grounds urged at the trial for the objection, (2) the full substance of the evidence admitted or rejected and (3) the pages of the Transcript of Proceedings where the same may be found.

In the argument, under Specification of Error No. 5, appellant contends the court erred in admitting the testimony of Mr. Kunzig, with respect to the number of persons required to be on the Subcommittee.

At the outset, it should be observed that no objection was made by appellant at the time of the hearing, to the validity of the Subcommittee. The question of validity of the Subcommittee cannot be raised for the first time at the time of trial. In this case, the appellant relied on other grounds in refusing to answer the questions propounded. The validity of the Subcommittee, therefore, was no longer an essential element of the offense. *U.S. v. Bryan,* 339 U.S. 323, 1950; *Emspak v. U.S.,* D.C. Cir. 1952, 203 F.2d 54, reversed on other grounds, 349 U.S. 190, 1955, *supra.* In the *Bryan* case, the question of a proper quorum of the Committee was raised for the first time at the time of trial. The Supreme Court held that the government was not required to prove that a quorum of the Committee was present when the default occurred, and that under the circumstances, the defense of lack of a quorum was not open to the witness.

Though not technically required to do so, it was the purpose of the government, in asking the subject question, to show that the Subcommittee before whom appellant appeared was validly constituted and had a quorum present at the time. Appellant's contention that this testimony violated the "best evidence rule" is not supported. It is well-settled that when the matter to be proved is a substantive fact which exists independently of any writing, oral evidence of one who has personal knowledge of the facts is admissible. The fact in question was the number of persons required to be on the Subcommittee. Although this could be proved by the records of the Committee, it may be equally proved by oral testimony of a person having personal knowledge of the facts. The "best evidence rule" only comes into operation when there is a question as to the *contents* of a document or writing, in which case the best evidence of the contents would be the document or writing, itself. In *Herzig v. Swift & Co.,* 2 Cir. 1945, 146 F.2d 444, it is observed that "The federal courts have generally adopted the rational limiting the 'best evidence rule' to cases where the contents of the writing are to be proved." Oral testimony was held admissible in that case to prove certain facts, even though those facts had incidentally been recorded in the books and records of a partnership. Similarly, in *MacLaughlin v. Hull,* 9 Cir. 1937, 87 F.2d 641, the court admitted oral testimony of a witness testifying from his own knowledge as to the number of persons that had used a particular stairway, over the objection that the books and records recording this information were the "best evidence".

Since the witness in this case had a distinct and independent recollection of the matter and was personally present at the time, his testimony is competent as to these facts, even though they may have been recorded in the records and minutes of the Committee. *In re Ko-ed Tavern,* 3 Cir. 1942 129 F.2d 806; *Maier v. Publicker Commercial Alcohol Co.,* D.C. E.D. Penn. 1945, 62 F. Supp. 161; aff. 3 Cir. 1946, 154 F.2d 1020; 4 *Wigmore on Evidence,* 3d Ed., Sec. 1178; 32 C.J.S. *Evidence,* Sec. 786, 787.

Under Specification of Error No. 6 appellant contends that the court erred in sustaining objections to questions asked witness Kunzig on cross-examination by appellant. The first of these questions, which appear in the Transcript of Proceedings, part 2, pages 71 and 72, concerned the matter as to whether witnesses called before the Committee had thereby lost their employment. As more fully covered in other portions of this brief, these questions were entirely immaterial and irrelevant. For example, in *Morford v. U.S., supra,* the defense attempted to offer evidence to show that the purpose of subpoenaing witnesses before the Committee was to add the names of the witnesses to the Committee's "black list" and facilitate the Committee's efforts to destroy the effectiveness of the group to which the defendant belonged. The court pointed out that such evidence was immaterial and that the legislative purpose of the Committee could not be rebutted by impugning the motives of the Committee. We also observe in passing, that 2 U.S.C.A., Section 193 provides that:

> "No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress . . . upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous."

It follows that a witness may not refuse to testify before the Committee on the ground that it might cause him to lose his job.

Appellant next contends that it was error for the court to sustain the objection to the following question asked witness Kunzig by appellant (Tr. of Proc., part 2, page 74):

> "Q Now after this subpoena was served upon Mr. Simpson, was there any reasonable doubt in your mind or the mind of the committee where Mr. Simpson worked?"

For the reasons more fully stated in other portions of this brief, this question was immaterial, as the Committee would have the right to verify and confirm data secured by it and convert it into a sworn record for use by the Congress.

Under Specification of Error No. 6, the appellant also contends that it was error for the court to sustain objections to questions put by the appellant to Mr. Kunzig (Tr. of Proc., part 2, pages 77 and 78) with respect to the cost of securing information. This line of questioning was wholly immaterial and irrelevant to any issue in the case. Congress has the power of testimonial compulsion, which is necessary to carry out its function. In its search for truth, it is certainly not to be confined necessarily to any particular method. It obviously would

not be a defense to this charge that Congress might have secured the information elicited, by some less expensive method.

By its Specification of Error No. 7, appellant contends the court erred in sustaining objections to questions addressed by appellant to witness Joseph Santoiana, Special Agent in Charge of the Federal Bureau of Investigation at Portland, Oregon, as to whether the witness had any information regarding the appellant and as to whether the witness had consulted with any members or employees of the Congressional Committee before whom appellant appeared. (Tr. of Proc., part 2, page 92). This line of questioning was entirely irrelevant and immaterial to any issues in the case. As previously discussed, it would have been immaterial even if the Committee had the information sought to be elicited from the witness. The question as to whether another agency of the government has the information, becomes even less relevant. It is also well-known that the Federal Bureau of Investigation is part of the Department of Justice of the Executive Branch of our Government, whose investigations are carried on in connection with the enforcement of the federal laws and whose reports of investigation are not normally available to the Committees of Congress for use in their investigations for legislative purposes.

Under Specification of Error No. 8, appellant contends the trial court erred in admitting any testimony, on the ground of the insufficiency of the indictment, which subject has been covered previously in this brief. Under the same specification of error, appellant repeats

his contention that the trial court erred in admitting testimony of the witness Kunzig with respect to the rules and purpose of the Committee, on the ground that such testimony was in violation of the "best evidence rule". As more fully discussed earlier in this brief, the testimony of this witness, speaking from his own personal knowledge, was not in violation of the "best evidence rule". In addition, it was unnecessary for the prosecution to prove the validity of the Subcommittee and the presence of a quorum, as no objection was made by appellant at the time of the hearing before the Committee.

E. Court did not Err in Denying Appellant's Request, Made After Verdict, to Present Further Testimony on Issues of Pertinency and Privilege.

In his motion for new trial, appellant contended for the first time, in part 18 thereof (Tr. of Rec. 40) that the court erred in failing to grant appellant the opportunity to present testimony and argument on the claim of privilege. In the same motion for new trial, appellant made the further request, for the first time:

> "Defendant further moves that defendant be permitted to submit further testimony on the issues that the court has confined to itself without the intervention of a jury." (Tr. of Rec. 41)

Appellant was present in court at the commencement of the trial of Donald M. Wollam, which was a similar case tried the day before the present case. At that time, the question was discussed as to whether the matter of privilege would be heard before the court outside of the hearing of the jury, at which time counsel

for Wollam decided to have all of the evidence presented before the jury. (Tr. of Proc., part 3, pages 34, 38 and 39).

At no time in the present case did appellant request that he be permitted to submit testimony to the court outside the hearing of the jury, on either the issue of pertinency or privilege, until the present request was belatedly made following the verdict of the jury. As a matter of fact, appellant produced witnesses which, it is now asserted in his brief, were produced on both the issues of pertinency and privilege.

The trial proceeded on the theory that all of the evidence upon all of the issues would be presented at the trial, within the hearing of the jury, but that the court would determine the issues of pertinency and privilege and the jury would determine the other issues. The court indicated its determination of the issues of pertinency and privilege by the instructions given to the jury, in which the court stated that it had found as a matter of law that the questions propounded were pertinent to the matters then under inquiry (Tr. of Proc., part 2, page 122) and that the court had determined that the appellant was not lawfully entitled to refuse to answer the questions on the ground of constitutional privilege. (Tr. of Proc., part 2, page 129). Following these instructions, in which appellant was advised as to the findings of the court with respect to pertinency and privilege, appellant failed to make any request to present further testimony on these issues and rested his case (Tr. of Proc., part 2, page 114) before the jury retired. Appellant should not be allowed to speculate upon

the verdict of the jury with the idea of requesting an opportunity to present further testimony in the event the verdict is not in his favor. In light of all these circumstances, and particularly the fact that appellant did have an opportunity and did put on evidence with respect to pertinency and privilege at the trial, before the jury, it was not error for the court to deny appellant's request made for the first time in his motion for a new trial, for a further opportunity to present testimony on these issues.

F. Motion for New Trial on Ground of Newly-Discovered Evidence Was Properly Denied.

Following trial, appellant sought new trial on the basis of newly-discovered evidence, in substance reasserting the same matter as in his motions for continuance. No proper showing was made. (Tr. of Proc., part 3, pages 36 ff. 43). The trial court, entitled to discretion in ruling on the motion, did not abuse the discretion. The motion failed to (1) identify the new evidence or witnesses; (2) show (a) that it was unknown at trial time and (b) that it was material, not merely impeaching; (3) show (a) that it would probably produce acquittal or (b) that its delayed discovery was not due to lack of diligence. *Wagner v. U.S.*, 9 Cir. 1941, 118 F.2d 801; cert. den. 314 U.S. 622, 1941.

V.

INSTRUCTIONS WERE FAIR AND COMPLETE.

By its Specification of Error No. 9, appellant has made a blanket contention that the trial court erred in

all respects excepted to by appellant in relation to the charge to the jury. The specification of error, however, does not comply with Rule 18(2)(d) of this court. The alleged erroneous instructions given or instructions refused are not set out *totidem verbis,* together with the grounds of the objections urged at the trial.

Appellant submitted no written requested instructions. (Tr. of Proc., part 2, page 111). Appellant orally requested three instructions. (Tr. of Proc., part 2, page 112). The one with reference to a witness found false in one respect may have his testimony doubted in other respects and the one with reference to the identity of the accused, were given. (Tr. of Proc., part 2, page 121). The orally-requested instruction relating to privilege was not given, as this was an issue for the court.

Following the instructions, the appellant made numerous exceptions to instructions given, mainly on the theory, however, that the questions of pertinency and privilege should have been presented to the jury. (Tr. of Proc., part 2, pages 132, 133 and 134). As more fully discussed elsewhere in this brief, the questions of pertinency and privilege are for the court's determination. *Sinclair v. U.S.; Chapman v. U.S.; Rogers v. U.S., supra.*

CONCLUSION

The appellant had a full and fair trial free from prejudicial error.

The facts of this case are different from those in *U.S. v. Josephson, supra,* in that in *Josephson,* the witness refused to be sworn. Herein, the witness was sworn, gave his name, and then refused answer to all other innocuous questions. No distinction in principle appears. Appellee submits that the *Josephson* case should control this litigation. The claims of privilege were on the record not proper. The conviction should be affirmed.

Respectfully submitted,

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September 1956

No. 14,743

United States
COURT OF APPEALS
for the Ninth Circuit

HERBERT SIMPSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon

APPELLANT'S REPLY BRIEF

FILE
OCT 1956
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No. 14,743

United States
COURT OF APPEALS
for the Ninth Circuit

HERBERT SIMPSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon

APPELLANT'S REPLY BRIEF

RESTATEMENT OF BASIC PRINCIPLES

The Government may not in two proceedings or by indirect means do that which it knows it may not do in one proceeding or by direct means. Thus it may not subpoena a witness before a grand jury to inquire about his alleged violation of the Smith Act and require him to answer identifying questions and, upon his refusal to answer them because such questions might tend to incriminate him, prosecute him for contempt and in the

contempt proceedings require him to produce identifying evidence against himself or for the want of it be adjudged guilty of contempt.

By the same token the same Government, should not be allowed to use similar proceedings through its legislative arm, i.e., a Congressional Committee, to ask identifying questions of one whom it claims is a Communist and, if, under the privilege of the Fifth Amendment, he refuses to give the identifying answers, prosecute and convict him of contempt unless he actually adduces identifying evidence linking him as the person the Government claims is a Communist.

Either the Committee knew the answers to the questions it propounded to appellant or it did not. If it knew the answers the inquiry could serve no purpose pertinent to whatever the subject of inquiry was. If it did not know the answers or had any doubts about them and the subject of inquiry was Communism and the Committee sought the identifying answers, the answers were privileged because those same identifying answers could supply a necessary link in a prosecution against appellant.

Moreover, even if it knew the answers and wanted corroborative sworn testimony of the witness, defendant was not lawfully bound to give identifying evidence to help make a link in the chain of a prospective prosecution. This is especially true if the Committee is allowed to become a "tribunal" as it is called by Appellee on page 15 of its brief, and conducts a trial instead of gathering information for legislative purposes.

POINTS IN APPELLANT'S BRIEF NOT ANSWERED BY APPELLEE

Appellee fails in its brief to answer the argument and authorities set forth as a supplemental point under specification of error No. 24 at page 39 of appellant's brief. This is that the chairman of the committee failed to clearly and unqualifiedly overrule the claim of privilege under the Fifth Amendment and specifically direct appellant to answer the specific questions under the strict rule set down in the Emspak and Quinn cases and followed in the Fagerhaugh case. See also page 40 of appellant's brief. Nowhere in its brief is there any attempt to meet this fatal point by appellee. Therefore appellant reasserts his right to acquittal on that ground.

Appellee fails in its brief to show that it had made a prima facie case against appellant dehors the testimony of Robert L. Kunzig. Commencing at the bottom of page 40 of appellant's brief and into page 41, appellant cites testimony of Mr. Kunzig (Tr. of Proc. part 2, pages 61 and 62) showing his extensive education and legal experience. Yet we find on page 57 of the Transcript of Proceedings, Part 2, the following astounding admission on cross-examination:

> "Q. In Washington, D. C., is there a library that has the City Directory of Portland, Oregon, and the telephone books of Portland, Oregon?
> A. I don't know."

It is submitted that for want of any explanation or justification in the record for such colossal ignorance or evasion by the highly educated and experienced counsel

for the Committee and the Government's sole witness, all of Mr. Kunzig's testimony should be ignored and the case dismissed for want of a prima facie case.

However, even with Mr. Kunzig's testimony there are patent deficiencies from indictment to judgment of conviction and sentence.

RE: APPELLEE'S ARGUMENT I, page 4 et seq.

On page four of appellee's brief, it states that the indictment was legally sufficient. Under the headings of A and B it states that it is not necessary to either allege willfulness or to allege facts to negative possible defenses in the charge. When the writer went to law school he was impressed by a lecture given by one of his professors, a retired state supreme court justice, that sometimes the best reasoning may be had on a legal issue while sitting under the shade of a tree rather than delving into the detail of the law books.

Let us for the moment set aside the fact that the cases cited by appellee on page four under headings A and B do not actually support the propositions for which they contend; the import of the cases is that using the word unlawful necessarily includes the word willful in the indictment and therefore it is not necessary to allege willfulness. That is a far cry from the bare statement that it is unnecessary to allege willfulness.

An allegation of unlawful refusal to answer pertinent questions put by the committee through its subcommit-

tee may be too general, but at least it may be sufficiently inclusive of a valid charge. In 1954, not long before the hearings upon which appellant was convicted, Judge Louis Goodman of the Federal District Court in San Francisco was subpoenaed to appear before a Committee. He respectively declined the invitation, contending that the independence of the Judiciary under our Constitution justified his refusal to appear in response to such subpoena. Would appellee contend that Judge Goodman could be legally indicted for contempt on the bare allegation that he refused to appear or refused to testify? Certainly by applying just plain reasoning while sitting under the shade of a tree it should be clear to counsel for appellee that the refusal by Judge Goodman must have been "unlawful" or "without just, proper or legal cause" to create an indictable offense. There must be allegations substantially more than the refusal to appear or testify to make a crime. The number of justified or lawful reasons for refusing to answer questions are legion.

By the same token an allegation in an indictment that a defendant took property belonging to a third person would not state a crime. The owner may have authorized the defendant to take the property. The taking must be alleged to have been in some manner unlawful. An indictment that alleges that a defendant struck another person would not state a crime. The striking may have been in self-defense or it may have been in the course of a lawful boxing match.

The gist of a sufficient allegation of commission of a crime in an indictment is not merely in the first half of a valid indictment but in the second half which alleges directly and specifically the wrongful and/or unlawful phase of the act.

By the standard of simple justice and ordinary principles of law, the indictment in the instant case is insufficient to allege a crime in that it merely alleges the refusal to answer the questions propounded and fails to state either how or that such refusal was done unlawfully or willfully or worngfully or without just, proper or legal cause. The void in the indictment is basic, fundamental and fatal.

Appellant has thus far attempted to show by reason and principle that appellee's points A and B appearing on page four of its brief are not well taken. It is further submitted that none of the authorities cited by Appellee under A and B support or appear to support the proposition that an indictment so devoid of guts as this one is sufficient to withstand appellate court scrutiny.

In U. S. vs. Deutsch, the indictment alleged that the defendant "unlawfully refused". Appellant submits that a bare allegation of refusal without the "unlawful" should not and would not have been sustained.

In the case of Field vs. U. S., there was no statement of what the indictment contained and the court did not state that there need be no allegation of willful refusal or its equivalent. The court's opinion merely discusses what was meant by the word willful as used in the

statute. This case involved a failure to produce records, not a refusal to testify.

In Sinclair vs. U. S., the indictment did allege that the defendant refused "unlawfully". Certainly this case is no valid authority for the contention of Appellee, especially in view of the supreme court's holding that the allegation "unlawfully" is sufficient.

In Dennis vs. U. S. the defendant was indicted and convicted for "wilful failure to respond to a subpoena" . . . As the court states on page 988 "He was indicted and convicted for wilful default in answering a lawful subpoena."

In the Chapman case (1895) the indictment did allege that the defendant wilfully refused to answer. So stated the Court in Chapman vs. U. S., 5 Ct. App. D.C. 122 (1895), pages 125-126.

In the Eisler case the Court held that it was not necessary to negative a defense which on the record was not available to defendant. This is a far cry from Appellee's contention under B that this case is authority for the proposition that it is not necessary to allege facts to negative possible defenses. In respect to this case and in almost each and every one of the cases cited by Appellee in its brief careful reading of the cases discloses that they are not authority for the contentions made for them by Appellee.

Appellee then makes the following contention on the sufficiency of the indictment, on page 4 of its brief:

> "C. It is not necessary to allege the evidentiary facts showing pertinence, but allegation of pertinence was in fact made by reference to the appropriate Congressional action establishing the Committee and its scope of investigation, together with the particular pertinent questions charged."

Firstly, appellant has never contended that the indictment must allege the evidentiary facts; appellant urges that there must be a sufficient allegation of what the question under investigation by Congress or the Committee was and, further, the indictment must contain a sufficient allegation that the questions put to the indictee sought answers and information which were pertinent to the question under investigation, and how they were pertinent.

In these respects the indictment was wholly deficient. It contains no allegation whatsoever of what the question was that the Committee was investigating or inquiring about. This is fatal to the indictment.

The indictment did say "and was asked questions which were pertinent to the question then under inquiry." Since there was no allegation at all stating what the "question then under inquiry" was, this bare statement is meaningless.

The statute, 2 U.S.C. Sec. 198, says "refuses to answer any question pertinent to the question under inquiry," and the indictment must therefore contain not only the "question under inquiry" but must show the relevance and pertinence of the questions to the question

under inquiry. The questions asked do not have an obvious relevance or pertinence to even the authorized functions of the Committee as set forth in the cited law and resolution as set forth on page 5 of Appellee's brief. See also House Resolution 5, which is exhibit 1. We therefore have a void upon a void in the indictment and it is doubly insufficient.

Moreover, a careful perusal of the indictment discloses that although the indictment does contain the above bare and insufficient statement that appellant "was asked questions which were pertinent to the question then under inquiry", it does not allege that the questions set forth in the indictment were "pertinent to the question under inquiry." This additional deficiency should not be treated lightly. The evidence in the case shows that Herbert Simpson was asked questions by the Committee other than those for which he was indicted. Perhaps those questions were pertinent to the undefined "question under inquiry". Perhaps an indictment for failure to answer them might be proper. But an indictment that fails to specifically and clearly allege that each of these particular questions was pertinent to the "question under inquiry" fails to set forth a valid indictment for this reason as well as the others.

Now let us consider the contention by Appellee that the citing of Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828), and H. Res. 5, 83d Congress, in the indictment, substitutes for the want of an allegation of the "question under inquiry" and thereby be-

comes an allegation of the "question under inquiry". The first answer to this contention is that it is invalid on its face. There is no pretense in the indictment that the first paragraph of the "Introduction" in the indictment was even intended to constitute an allegation of the question under inquiry. This subject would not be pursued any further except for the fact that on such contention and other untenable ones, appellant was convicted of a crime and sentenced to ten months in jail. Appellant therefore does pursue it further.

How does House Resolution 5 allege the question under inquiry? This resolution is the one that adopted the rules for the 83d Congress. These are XLII Rules with numerous sections and subsections and subsubsections, which were read by the clerk at the time the resolution was adopted until further reading was dispensed with by the Speaker of the House. A general reference to the rules of the House does not inform a defendant what the "question under inquiry" was on a specific date at a specific place by one of the Committees of the House. But after digging through the rules to rule XI of Powers and Duties of Committees and then coming to 17., Committee on Un-American Activities, what do we further find? We find that there are three wide areas of inquiry authorized, the third of which is "all other questions in relation thereto that would aid Congress in any necessary remedial legislation". It is clear, therefore, that the Committee was authorized to investigate or inquire about "questions" in the plural and not merely a question and that a reference to that specific subsubsection of a specific rule would not inform an

accused or any one else what the "question under inquiry" was.

As support for the contention that the citing of the Reorganization Act and House Resolution 5 substitutes for an allegation of what the question under inquiry was, counsel for Appellee cite Sinclair vs. U. S. Did the Court in that case really give any comfort to such contention of Appellee? Clearly not. The Government in that case set forth in considerable detail in the indictment the question under inquiry and the Court said on page 285: "By way of inducement the indictment set forth the circumstances leading up to the offense which in brief substance are as follows:". And then follows approximately 700 words of setting forth what was being investigated, which included the substance of the various resolutions authorizing the inquiry. Appellant asks the Court to consider this case as authority for the verity of Appellant's motion to dismiss the indictment.

Appellee states on page 6 of its brief that Congress can be presumed to act lawfully and, therefore, the indictment is sufficient. The Court said the following on page 296 in the Sinclair case:

> "Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained

> to some matter under investigation. . . . the proof on that point was ample."

In U. S. vs. Lamont and companion cases the Court did take into consideration the Reorganization Act in relation to the indictment for the simple reason that it appeared on the face of the indictment that the subject under inquiry was not within the purview of the authority of the Committee involved. The Court says:

> "There is no allegation in the indictments here linking the inquiry conducted by the subcommittee to the grant of authority dispensed to its parent committee."

The inadequacy of the indictment in the instant case is evident when we examine it in the light of the Lamont case where the Court states on page 2031:

> "As presented to us, the emphasis has been upon matters of criminal pleading and adequate notice; while these are involved, the issue goes beyond this to the very substance of whether or not any crime has been shown. This concentration upon procedure perhaps explains why in his generally able brief the prosecutor has failed to touch upon the crucial problem at the heart of the case. For the charges could not have survived had there been more formal and precise allegations of pertinency, since the governing legislation viewed in the light of the pertinent precedents demonstrates the lack of pertinency of the questions."

As previously pointed out, the question under inquiry in the instant case is not mentioned and it is impossible to ascertain whether the questions set forth in the indictment have any pertinency to the question under inquiry. Certainly there is no apparent pertinency in the indictment.

Under point D on page 4 of its brief Appellee cites the Josephson and Morford cases in support of the sufficiency of the indictment. In the Morford case the sufficiency of the indictment is not involved and neither the allegations in the indictment, nor their substance, are set forth in the opinion. In the Josephson case the defendant defaulted and therefore the pertinence of the questions asked in relation to the question under inquiry is not properly reached. Josephson's physical appearance at the hearing while refusing to be sworn but stating that he wouldn't answer any questions merely confirmed his default.

Under point E on page 4 of its brief Appellee cites two cases as authority for the sufficiency of the indictment. In the Townsend case the indictment reads in part:

> ". . . the said Francis C. Townsend unlawfully, knowingly and willfully and without leave, did absent himself from the presence of said Committee and from the room and place . . . where the said Committee was functioning . . . and thereby . . . unlawfully and willfully did make default."

This case is hardly authority for a contention that it is not necessary to allege "unlawfully" or "willfully" or both or that a default is the same as refusal to answer questions pertinent to the inquiry when there is no allegation of the subject of inquiry and nothing to indicate the pertinence of the question asked to the subject of inquiry.

The decision in Chapman v. U. S. is likewise not applicable. Here too there was no question involved as to whether or not "willful" or an equivalent term need be

used. "Willfully" was used in the indictment. See Chapman v. U. S., 5 Ct. App. D. C. 122 (1895) pages 125-6. Which states at pages 125-126 "Investigation was commenced, and according to the averments of the indictment . . . the appellant . . . each and all of said questions willfully refused to answer." The later decision cited by Appellee held that "refusal to answer necessarily implied willfulness in the legal sense" as distinguished from refusal in bad faith or with evil intent. In any attempt to construe that decision as holding that "wilful" or an equivalent need not be stated in the indictment, two things should be borne in mind. First, this seems to have been the first case under Section 192 to reach the Court; the later cases as cited in Appellant's Opening Brief hold otherwise. Second, any such holding would have been dictum in view of the fact that the indictment included the word "willfully".

In the argument two additional case are cited.

The Fields v. U. S. case is discussed elsewhere. Here it is sufficient to note that it is not pertinent. It did not discuss the question of whether "willful" or an equivalent word need be used in the indictment, but what was meant by the word "willful" as used in the statute (deliberate and intentional as distinguished from inadvertent or accidental).

In the Deutsch case the indictment alleged that the defendant "unlawfully refused."

RE: APPELLEE'S ARGUMENT II, page 7 et seq.

Under point A on page 7 of Appellee's brief appears the following: "Pertinence of questions was a matter for the court, with or without receiving evidence." It cites five cases in support of that point. First let us analyze the cases.

In two of them, the Chapman and Fields cases, pertinence, much less whether the Court should make a decision with or without evidence, were not issues in the cases. The respective courts simply did not hold or even reach the points set forth in Appellee's A.

The Josephson case was a default case and therefore the pertinence discussion may have been wholly immaterial in that case. The Court did say in that case, however:

> "The appearance and refusal of the appellant to testify before the subcommittee thus being shown, the jury had evidence from which it could find, as its verdict shows it did, that the appellant refused to answer any questions pertinent to the question under inquiry . . ."

Since, in fact, Josephson was in default for refusal to be sworn, he was not at any stage a witness who appeared in the legal sense and the dictum in any event stated that "the jury had evidence . . ."

The Morford case revolves around the issue of ambiguity of the indictment because the statute furnishes no standard by which a witness can determine whether a question is pertinent. The court did say in that case that pertinency is a matter of law for the Court to decide

and cited the Sinclair (a U. S. Supreme Court case) as its authority. In the Sinclair case the court said on page 296:

> ". . . it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation . . . the proof on that point was ample."

It is clear from the above that the Supreme Court did require the U. S. to both plead and show that the question pertained to some matter under investigation.

To make a criminal case against a witness, the statute specifically requires pertinence. There is no common law on this because under the common law there was no such crime for such refusal. Therefore, we must look to the statute and that is clear and specific, the question must be pertinent to a subject properly under inquiry by an authorized committee. As is stated in the Sinclair case, the pertinence must be both pleaded and proved. Moreover, there is no good reason for deviating from the Constitutional right to a jury trial on all the issues, including this one.

RE: APPELLEE'S ARGUMENT III, page 8 et seq.

On page 8 of Appellee's brief, heading III, Appellee contends that privilege was improperly claimed. Its argument on this point to page 16 was, appellant believes, fully answered and overcome in appellant's opening brief but appellant is impelled to make further comment.

Appellee states on page 15 that the questions asked of appellant and which he refused to answer are innocuous. This confirms a similar contention in appellant's opening brief. Standing alone in the indictment, without the question under inquiry being pleaded, without alleging to what these questions were pertinent to a specific question under inquiry, these innocuous questions do not form a proper basis for criminal prosecution. The law and the Government, in their majesty, may not imprison people on whim, caprice or fancy. That is all we have in the indictment; no allegation of a wrongful, unlawful or willful refusal to answer pertinent questions on an alleged authorized subject or inquiry by our great Congress; just refusal to answer innocuous questions. The indictment cannot stand.

Put those same questions, however, in the environment of an accusation of Communism, along with Mr. Kunzig's testimony that one of the purposes of the Committee was to investigate Communism in the army and in education, etc. and we are no longer confined to an innocuous indictment but a justified fear of policemen, klieg lights and prosecution.

Appellee makes no distinction between the staged and threatening setting of the Committee questioning and the willingness of appellant to speak before the Court prior to sentencing. See Appellee's brief, pages 13 and 14. It is one thing to be told by a branch of the Government: We have statements under oath that you are a Communist, or perhaps something lesser, say a murderer, now tell us all about yourself and what you

know about Communism or that murder, starting not with Z but with A and then going through the whole gamut of your knowledge to Z. Tell this to us under oath while the cops are outside the door and while the radio carries your statements to whomever in your community might be interested in listening and while the newspaper reporters are preparing headlines for tonight's papers about you. If the Appellate Court can see no more distinction between the two situations any more than counsel for Appellee did when writing its brief, then counsel for Appellant lacks the words that could demonstrate the difference in fact and in principle.

On page 14 of its brief Appellee states that by "parroting numerous constitutional amendments" appellant "clearly shows . . . that he was opposed to the existence of the Committee and used this method to furstrate it." This is the gist of the fantastic and amazing gravamen of Appellee's brief, that if one swears by or relies upon our constitution, ipso facto one is contemptuous.

On page 11 of its brief Appellee states that "appellant, after stating his name, refused to answer any other of the identifying questions referred to in the indictment." Obviously, appellant could not have identified himself as a witness before that Committee without at the same time identifying himself as the Herbert Simpson who was named as a Communist and laying himself open to prosecution on account of his own words.

Did counsel for Appellee consider the fact that the decisions in the Emspak and Quinn cases had not been handed down by our Supreme Court when the Commit-

tee hearings were had in June, 1954, and that then the sentencing occurred in January, 1956, when those decisions were the law of the land? Do they realize that making the statement to the Court after the conviction was not to a Committee whose next question was sure to be "Are you the Herbert Simpson who was and or is a Communist?" Does the fact that he gave this information to the trial court in January, 1956 mean that he wasn't afraid to give it to the Committee in June, 1954?

On page 15 of its brief Appellee chides counsel for appellant for failure to adduce some evidence of the basis for the exercise of the privilege under the Fifth Amendment. Certainly counsel for appellant was not going to scout around and try to produce evidence against his client that Appellee did not already have and which could lay him open to prosecution. However, appellant did try to get the evidence that Appellee had against him for introduction in evidence but Appellee refused to produce it voluntarily and the court erred in failing to require it to produce it. However, cross examination of Mr. Kunzig did elicit some of the information that the Committee had, certainly more than sufficient to justify a refusal to answer the questions involved. Counsel for Appellee objected at the trial to appellant's adducing more of such evidence in objecting not only to some of the cross examination of Mr. Kunzig but to each of the questions put to Joseph Santoiana the F.B.I. Agent at Portland. The trial court, in error, sustained the objections.

Appellant will not permit to go unchallenged the

statement on page 14 of Appellee's brief that "Appellant took it upon himself to resist what he chooses to assert was a 'witch hunting' committee . . ." Appellant himself did not testify at the trial and, therefore, no such statement was made by him there. The testimony of appellant before the Committee appears as Government's Exhibit 5-A. Perusal of this exhibit discloses that he made no such assertion before the Committee. Appellant's affidavits in support of his motion for subpoena duces tecum and for inspection appear on pages 32 and 35 of the Transcript of Record and no such assertion appears in them. Appellant's statement to the Court preceding sentencing appears in the Transcript of Proceedings, Part 3, commencing on page 55, and he makes no such assertion there. These constitute all of the statements, sworn and unsworn, of appellant in the record.

Many of the finest citizens of our country, amongst them judges, leading teachers and scholars, have concluded and stated that this Committee is guilty of witch hunting and appellant might have been right if he had so said, but there is not a stitch of evidence that he did. Appellant might have been justified in at least thinking of the Committee as a witch-hunting Committee. There is a common saying to the effect that you can't hang a man for what he thinks. Is counsel for Appellee intimating that appellant ought to have said, or ought to have thought that the Committee was guilty of witch hunting and, reversing the tradition of the above mentioned common saying, hang appellant for what he ought to have said or at least ought to have thought?

Or did counsel for Appellee mistake as a statement of Appellee the quote of counsel for appellant from a book written by Robert K. Carr, political science professor at Dartmouth, which quote appears on page 58 of Transcript of Proceedings, Part 3, as follows:

> "As long as the Committee continues to exist, the most reactionary forces in American life are sworn to seek to control it, and to use it as an instrument of witch-hunting and suppression. They have succeeded in doing so in the past. Is there any reason to suppose they will never do so again?"

Counsel for Appellee may hang Mr. Carr for what he said and, if he wishes to go a step further, he may hang counsel for appellant for quoting Professor Carr but the witch hunt directed at appellant for accusing the Committee of witch-hunting would result in a hanging without an iota of evidence in the record.

RE: APPELLEE'S ARGUMENT IV, page 16 et seq.

On page 22 of Appellee's brief appears the following misstatement:

> "The broad general demand for all reports, documents and records in possession of the Committee marks the motion for subpoena duces tecum as a fishing expedition and attempt to rummage through the Committee's file for purposes outside of the case."

First, what if the motion were in part a fishing expedition? The whole gamut of the Federal Rules of Civil Procedure, encourages and makes practical what counsel for Appellee calls "fishing expeditions." The

whole spirit and practical rules make such expeditions possible for the very purpose of ferreting out evidence that the other side has and which may be competent evidence. The name calling of "fishing expedition" should not throw shudders in the minds of an appellate Federal Court as it may at times in the minds of some State Courts.

That appellant's "fishing expedition" would have caught some pertinent evidence is clear from Mr. Kunzig's own testimony that the Committee had confidential evidence about Communist membership and activities of Herbert Simpson and appellant should have been given the opportunity to inspect and introduce into evidence all the evidence in the Committee's possession relating to the details of the Communist activities, etc., which would have constituted proof of the right to exercise the privilege under the Fifth Amendment to refuse to answer each of the questions propounded by the Committee.

This is what was requested by appellant as the motion and affidavits (Tr. of Rec. 31 to 37) show, and the statement of counsel for Appellee in their brief about "attempt to rummage through the Committee's file for purposes outside of the case" is truly without a scintilla of even color of foundation. Its falsity is patent and demand is made for Appellee to retract it.

The purpose of the motion was to prove one and more of the defenses that appellant had to the charges against him and it is quite evident from the affidavit of appellant and the testimony of Mr. Kunzig that the evi-

dence was available in the possession of the Committee to prove appellant's innocense of contempt. The sound discretion of the court should certainly have required the production of that evidence. And appellant does not rely only on the testimony of Mr. Kunzig, which came after the motion was denied. There is a presumption of truth to sworn statements and appellant's affidavits were not contradicted by Appellee. Appellee filed no counter-affidavits to the effect that it did not have the evidence appellant sought produced. Nor was any unsworn statement made to the Court to that effect. Appellee's counsel made no contention that the Committee did not have the introducable evidence appellant requested and needed for one and more of his defenses. The only real question before the Court was whether the evidence should be made available for appellant and sound discretion should have impelled the Court to require the production of available evidence so that justice could be done.

Appellee cites authorities to the effect that Rule 16 of the Federal Rules of Civil Procedure is not applicable. Appellant does not and did not contend that that rule applied but appellant does contend that Rule 17(c) and the case of Bowman Dairy Co. v. U. S., 341 U.S. 214, do apply. Appellant concedes that under that rule it is discretionary with the trial court, subject to abuse, and appellant urges that the trial court did abuse its discretion in not granting the right of subpoena duces tecum and inspection. Mr. Kunzig testified (Tr. of Proc. Part 2, page 24), ". . . we had information, confidential information, that Mr. Simpson was a member of the

Communist party. That was borne out by sworn public testimony . . . those two gentlemen both testified under oath that they knew . . . that the defendant here today, Mr. Simpson, had been . . . even on the State Central Committee of the Communist Party here in Oregon." Counsel for appellant had good cause to believe that the Committee did have in its possession such information and more—information that would convince the court that the Fifth Amendment privilege was rightly exercised. In denying appellant's motion the trial court in effect said, "I won't look at the documents you are trying to reach."

It was appropriate for the court to examine the documents requested itself and then do the judging of whether the information was relevant to appellant's defense and whether it could be disclosed to counsel for appellant. Since the trial court reserved to itself the issue of whether the privilege was properly exercised and did not intend to submit the matter to the jury and since the evidence sought to be produced was sought for that defense as well as the defense that the Committee knew all the answers to all the questions set forth in the indictment, the court clearly abused its discretion in refusing to grant appellant's request to examine the evidence and then judge. The trial court seemed so intent on the point that having the answers to the questions was not in its opinion justification for refusal to answer the questions, it failed to give any or adequate consideration to the other basic reason for appellant's need of the evidence that remained locked in the Committee's files, i.e., to justify

the claim of privilege. (See appellant's affidavit on page 36 of Transcript of Record.)

Most issues that have arisen on allowing a subpoena duces tecum in criminal cases, came about under sets of facts wherein the defendant sought to subpoena information or evidence in the possession of the prosecuting attorney. In the instant case the prosecuting attorney nor his superior had the evidence. Defendant was not seeking to elicit for perusal the cards that the prosecution was going to deal out against the defendant at the trial. The evidence defendant needed was in the possession of a legislative branch of the Government and lay dormant and useless to defendant unless the court in the exercise of sound discretion required the production of the evidence face up so that the appellate court, if not the trial court, could see the documents that could prove defendant not guilty of the crime charged. It must be clear that Rule 17 (c) exists for just such a purpose and the refusal to grant appellant the basic right under it was reversible error.

On page 33 of its brief Appellee cites U. S. vs. Bryan and Emspak v. U. S., D.C. Cir. 1952, 203 F. 2d 54, to show that the validity of the subcommittee need not be proved since its validity was not questioned at the hearing. The Bryan case involved the refusal to produce records and related to the existence of a quorum. The Emspak decision was reversed in the Supreme Court, as Appellee itself stated, and the Supreme Court could have but did not affirm the validity of the subcommittee and could have but did not deny the defendant the right to question its validity.

For further enlightenment we cite the District Court opinion in the Lamont case appearing in 18 F.R.D. 27, D.C. S.D. N.Y. The Circuit Court of Appeals, in affirming the District Court refers to Judge Edward Weinfeld's "scholarly opinion," although the appellate court did not find it necessary to consider all of the points covered by Judge Weinfeld.

One of the statements by Judge Weinfeld was that the indictment failed to plead (as does the instant indictment)

> "that the Committee before which the alleged refusal to answer occurred was duly empowered by either House of Congress to conduct the particular inquiry, setting forth the source of this authority."

And at page 36:

> "Here the authority of the Committee to act is seriously challenged. The challenge finds support in the failure of the very statutes and resolutions referred to in the indictment to disclose that any power to conduct the particular inquiry was ever delegated to it."

On principle the prosecution should allege in the indictment and prove at the trial by competent evidence the basic contention that a validly constituted subcommittee, acting under authority granted it by the Congress, under an act of Congress, conducted a lawful hearing. If the defendant found out later that the Committee was a Kangaroo Committee and had no lawful existence and therefore had no right to invade defendant's privacy, why should defendant's earlier ignorance or retisence make legal that which was not so?

On pages 34 and 35 of its brief Appellee cites a number of cases and other authorities on its contention that the best evidence rule did not apply to Mr. Kunzig's oral testimony of what he observed Congress or the Committee do. Reading of the cases cited discloses that those decisions have no resemblance to the point here involved. The following citations, however, do.

House Resolution 5

Rules adopted for the 83d Congress

Rule XLII:

"General Provisions

"The rules of parliamentary practice comprised in Jefferson's Manual and the provisions of the Legislative Reorganization act of 1946, as amended, shall govern the house in all cases to which they are applicable, and in which they are not inconsistent with the standing rules and orders of the house and the joint rules of the Senate and House of Representatives."

Rules XI:

"Powers and Duties of Committees

"25 (a) The rules of the House are hereby made the rules of its standing committees so far as applicable, except that a motion to recess from day to day is hereby made a motion of high privilege in said committees.

"(b) Each committee shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded."

Public Law 601 (Legislative Reorganization Act of 1946), page 831, Sec. 133 (b):

"Each such committee shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded."

20 Am. Jur. 377, Sec. 421:

"The commission of a public officer is the best evidence of his appointment and authority."

20 Am. Jur. 375, Sec. 418:

"Public records and documents of a public character are subject to the operation of the best evidence rule; and where the contents of such records or documents are material to an inquiry, the records or documents, or, in proper cases, certified copies thereof, should be produced."

32 C.J.S. 737, Sec. 808:

"The rule that the record is the best evidence has been applied to . . the record of proceedings of a legislative body."

IX Wigmore, Sec. 2427, page 24:

"Where by law an act is required to be done in writing, i.e., is ineffective unless so done, the writing is of course the only permissible subject of proof."

It was prejudicial error for the Court to accept for itself and to permit the jury to receive the oral testimony of Mr. Kunzig on the acts of Congress or its Committees.

RE: APPELLEE'S CONCLUSION, page 42

Here Appellee equates the instant case with the Josephson case, admitting however that Josephson refused to be sworn. The difference between the two cases is major. The one comes under the default clause and pertinence is not properly reached; the instant case is decidedly different. Appellant did respond to the subpoena, he did appear, he was sworn, he did give his name and he did listen to specific questions and give specific reasons for not answering such questions and he did answer such questions as he thought safe and proper. The language of the decision in the Josephson case should be confined to the facts of that case.

SUMMARY

In concluding appellant's plea for acquittal may we but quote from Bowers vs. U. S., on page 452:

> "It will not do to say that the questions were preliminary in nature and had they been answered, would have led to and been followed by questions plainly pertinent, for on that theory pertinency need never be shown in a prosecution under the statute. It could always be said the questions were preliminary. The indictment charged the seven questions were themselves pertinent."

And from the words of Chief Justice Warren in Quin vs. U. S., on pages 672, 673 and 674:

> "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to

an area in which Congress is forbidden to legislate. Similarly the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and Judiciary."

"Coequally with our other constitutional guarantees, the self incrimination clause 'must be accorded liberal construction in favor of the right it was intended to secure.' "

"Clearly not every refusal to answer a question propounded by a Congressional Committee subjects a witness to prosecution under Sec. 192."

Respectfully submitted,

REUBEN G. LENSKE,
Attorney for Appellant.

No. 14,743

United States
COURT OF APPEALS
for the Ninth Circuit

HERBERT SIMPSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon

PETITION FOR REHEARING

FILED
MAR 13 1957
PAUL P. O'BRIEN, CLERK

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No. 14,743

United States
COURT OF APPEALS
for the Ninth Circuit

HERBERT SIMPSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon

PETITION FOR REHEARING

When appellant suggested to his counsel before last Christmas that he wished to visit his father in another State and that request be made of the Court for permission to leave the State of Oregon for such visit, the writer told appellant that surely by Christmas time a decision would be rendered acquitting him and, therefore, such request would not be necessary. The writer's erroneous statement was made upon the conviction that the appellate court could not write an opinion sustaining the defendant's conviction and answer satisfactorily

to itself each of the grounds set forth in the appeal. The writer had forgotten that the Court could write an opinion without answering the points raised as grounds for appeal. The writer requests the Court for a rehearing because the points raised on appeal were not only made in good faith but on sufficient foundation of law or principle or both so that a careful reexamination of them with the view of writing an answer to them will lead to a reversal on one or more of the grounds set forth.

In view of the fact that appellant firmly believes that the Court's opinion in this case is in direct conflict with the decision of another panel of this Court in the Fagerhaugh, Jackins and Starkovich cases request is made that a rehearing be granted and that on such rehearing the Court sit en banc.

The Court in its opinion does reach three or four of the points that were argued on appeal. One is that it is not necessary for the indictment to allege "willful," "unlawful" or "wrongful" refusal to answer questions. Appellant asks the Court for a rehearing on this point so that the Court may reconsider the numerous authorities cited by appellant in his brief which, prior to this decision have held that an indictment without "willful" or "unlawful" is fatally defective. A refusal to answer need not necessarily be wrongful or unlawful. A refusal to return property to an owner may not be unlawful—the possessor may have a valid lease from the owner.

The Court sites with approval the case of Barenblatt vs. U. S., No. 13327, U. S. Circuit Court of Appeals, Dist. of Columbia, Jan. 3, 1957. The indictment in that

case read "unlawfully refused to answer." In its opinion on page 3 the Court said "The indictment charges that these questions 'were pertinent to the question then under inquiry', and that the subcommittee was conducting hearings at the time pursuant to its enabling resolution." Residence was not one of the questions on which the indictment was based if such question was asked. On page 7 of its opinion the Court stated, ". . . appellant was asked several times if the grounds for his objections encompassed the Fifth Amendment privilege against self-incrimination, which he stated they did not." On page 14 the Court quotes from Quinn v. U. S., 349 U.S. at 160-161, "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose."

The Court also cites Sachar v. U. S., No. 13302, U. S. Circuit of Appeals, D. C., Jan. 3, 1957. In that case the language of the indictment does not appear but the Court states that the indictment need not allege "willful" refusal to answer and cites Deutch v. U. S., 235 F. 2d 853, as its authority. The indictment in the Deutch case does allege that refusal to answer to be "unlawful," which is more inclusive than "willful" and even more necessary for a valid indictment. Also, in the Sachar case residence was not one of the questions involved and Sachar did not assert his right under the Fifth Amendment.

If new law is to be made against the vast number of previously adjudicated cases, it should be to protect the

individual against the powerful State and not to deprive him of rights which Courts have so frequently said he has.

The Court apparently erred in substituting its opinion of whether an isolated question would lead to an incriminating answer as against the justified fear of a witness in a hostile setting when confronted with a cluster of questions. The Court also erred in failing to hold that identifying questions—aimed at identifying a witness as a Communist—justify the exercise of the privilege. Either pertinency is a proper issue for the jury to try or the evidence on pertinency as well as evidence involving the privilege should not have been presented to the jury.

It is true that in Sinclair vs. U. S., 279 U.S. 263, the Court stated that pertinence was a matter of law for the Court to decide. That was in 1929 and indication is that there was no contrary evidence. In U. S. vs. Orman, 207 F. 2d 148, 3d Circ., decided on Sept. 18, 1953, the Court says on page 155 that in the Sinclair case the Supreme Court explained that the "question of pertinency was rightly decided by the court as one of law." The Circuit Court then points out with emphasis on page 156 that the Supreme Court further said "It did not depend upon the probative value of evidence." The Circuit Court then goes on to say on page 156:

> "In the instant case, however, evidence aliunde was introduced to prove pertinency. The weight and probative value of this evidence was for the jury, particularly since pertinency was an element of the criminal offense. We conclude that in this situation the trial court, taking the evidence as true,

> retains the power to decide that pertinency has not been established. But if the court concludes that pertinency has been proven, it is proper for it so to rule and then to submit the question and the evidence to the jury under appropriate instructions. This in substance is what the court below did."

In Keeney vs. U. S., 218 F. 2d 843, D.C., decided on Aug. 26, 1954, each of the three judges felt bound by the language in the Sinclair case but two of the judges further stated that pertinency should be a jury question. Judge Edgerton said on page 845:

> "If the Supreme Court had not ruled otherwise, we should have thought this a matter for the jury to decide, like any other element of the crime with which the appellant was charged."

Judge Prettyman said on page 849:

> "Were it not for the unequivocal holding of the Supreme Court in the Sinclair case, I would think that, since pertinency is an element of this offense, it, like all other such elements, would be for the jury. Since the Supreme Court holds the issue is not for the jury, I agree that evidence which is not relevant to the issues before the jury and which is highly prejudicial to the accused on those issues, ought not be heard by the jury."

Since pertinency is an integral part of the crime as set forth in the act the right to trial by jury on that issue is guaranteed by the Sixth Amendment to the Constitution. The proper interpretation of the Sinclair case appears in the Orman case and under that interpretation appellant was entitled to and should have been granted a jury trial on that issue.

However, if the trial court felt bound to try the issue of pertinency and not to submit it to the jury,

then all of the testimony in the case on either pertinency or privilege should have been excluded from the jury as it was clearly and highly prejudicial. Therefore, either under the interpretation of the Orman or Keeney cases, there was error in the record entitling appellant to a new trial. Appellant asks for a rehearing to better amplify and present this point.

The Court apparently failed to give full consideration to the most recent and controlling cases. Let us consider U. S. v. Trock, 232 F. 2d 839, decided April 9, 1956.

This is the latest case upon which the United States Supreme Court has expressed itself on the issue involved in the instant case. Defendant Trock refused to answer eleven questions before the grand jury, one of which was, "Can you type?" Trock was taken before the Court and asked how he could incriminate himself by answering each of the eleven questions and Trock refused to state. The District Court convicted him of contempt and the Circuit Court of Appeals affirmed. The Circuit Court said on page 841:

> "The defendant contends that the entire setting of the examination must be considered by the court, and that where it can be observed that the refusal to answer is not capricious, and where there is some basis for apprehension on the part of the witness, the court may not substitute its judgment for that of the witness. Defendant argues that the court in interpreting the refusal to answer need not base it upon a positive showing of incrimination.
>
> "Nevertheless, in appraisal of these eleven questions, when viewed independently each one is certainly free of any criminal suggestion."

The Circuit Court in that case did almost exactly what this Circuit Court did in this case. It said on page 842 of its opinion:

> "Applying then the test suggested in Hoffman v. United States, supra, to the facts of this case, it is not possible to find the presence of such a chain as is indicated in the Supreme Court opinion. There is no showing that the questions asked will 'link' the witness with any criminal activity."

That Court further said on page 843:

> "It has not yet been said by the Supreme Court that questions innocuous in themselves in a 'setting' or chain, such as is revealed in the record before us, would justify the witness in refusing to comply with the court order.
>
> "Should the witness decide to comply with the court order, in such event, if a second run of questions were propounded based on such answers as the witness might give to the foregoing innocuous questions, and were such second run questions to present a 'hot pursuit,' the time would then have arrived for a valid claim of immunity. But as the matter now stands, to quote Judge Swan, 'his persistence in claiming privilege is premature.' "

Said the United States Supreme Court on June 11, 1956, as appears in 351 U.S. 976:

> "No. 915. Trock v. United States. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Per Curiam: The petition for writ of certiorari is granted and the judgment is reversed. Hoffman v. United States, 341 U.S. 479.

If the Court feels bound by the Sinclair case in depriving appellant of a jury trial on the issue of pertinency it should most certainly be bound by the Trock case in allowing the claim of privilege.

As was stated in the comparatively recent case of United States vs. Gordon, 236 F. 2d 916, 2d Circuit, Sept. 12, 1956, on page 918:

> "The latest shaft of light from that source, in the direction of a case like this, is Trock v. United States, 351 U.S. 976, 76 S. Ct. 1048. There, in a Per Curiam, reversing, without opinion, this court's decision in 2 Cir., 232 F. 2d 839, the Supreme Court cited but one case, Hoffman v. United States, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118. In Hoffman, the Court said that the privilege is available unless it is 'perfectly clear' that the witness is mistaken and that the answer 'cannot possibly' tend to incriminate. The government contends that the facts in Hoffman were substantially unlike those here. But the same could have been said of the facts in Trock.
>
> "Indeed a majority of a panel of this court said just that in United States v. Trock, 2 Circ., 232 F. 2d at pages 842-843. (Footnote on page 919)."

Standing alone, the six questions that Gordon refused to answer were quite innocuous. The first question was "Do you pay dues?", certainly in and of itself no more ominous that "Where do you live?" The court, speaking through Judge Frank, says on page 920:

> "The government argues that answers at least to some of the questions, when taken singly, are remote from any tendency to incriminate. Even so assuming arguendo, we reject that argument for these reasons: The questions together form such a cluster as to interrelated matters that to separate out any one of them, treating it as if it stood alone, would be to artificialize the actualities. Moreover, although that same situation existed in Trock's case, the Supreme Court did not deal with any one of the questions singly but sustained the privilege as to all. This court's opinion in United States v. Cur-

cio, 2 Cir., 1956, 234 F. 2d 470, is distinguishable on its facts; besides, that opinion was uttered before the Supreme Court's decision in Trock."

The setting, upon which our appellate courts have placed so much importance in such cases was described by the prosecution's principal and only witness, Mr. Kunzig, the committee's ex counsel. See Tr. of Proc. pages 87 and 88. The regalia of radio, television and newspaper reporters was there in full force. Appellant objected to being televised and the camera during his testimony was directed to other persons in the courtroom.

The setting included testimony both prior to and after appellant's testimony wherein so-called friendly witnesses testified that appellant was a communist. The cluster of 17 questions asked of appellant included the following (Tr. of Proc. pages 83, 84):

"Q. Were you ever chairman of the finance committee of the Communist Party for the State of Oregon?

Q. Were you ever chairman of the finance committee of the Communist Party for the City of Portland?

Q. Now isn't it a fact, Mr. Simpson, that you have been in the Communist Party for fifteen years and that this very moment as you sit before this Committee of your Congress that you are a member of the State Committee of the Communist Party of Oregon?"

Mr. Kunzig testified (Tr. of Proc. page 80):

"Then the testimony came of these two specific witnesses, also in public testimony, saying, as I recall—and the record would show—that they knew he had been a Communist."

Following is testimony from page 81 of the Tr. of Proc.:

> "Q. Mr. Kunzig, will you please confine your answer to the following question: Was it not the purpose of the Committee in subpoenaing Mr. Simpson to inquire as to whether or not he was a Communist.?
>
> A. That would have only been one small purpose of the Committee.
>
> Q. That was one of the purposes of the Committee was it not?
>
> A. It would be one of the purposes to find out whether he was a Communist."

Mr. Kunzig testified (Tr. of Proc. page 48):

> " . . . But the Committee had information that we could get information under oath about Communist activities from men such as the witness here today—the defendant here today, Mr. Simpson—from men such as Mr. Owen, and others. Mr. Owen chose to answer all the questions and told everything he knew about the Communist conspiracy, and Mr. Simpson chose not to answer the questions."

Tr. of Proc. page 23 shows the following testimony of Mr. Kunzig:

> "Mr. Carney: Q. We are asking in this question specifically what was the purpose of the inquiry in Portland.
>
> A. Well, in general, as I said before, it was to investigate subversive and Communist activities in this area. I don't know how I could be very much more specific than that.
>
> A. The Committee was interested, sir, in seeing whether there were any subversive activities, for example in connection with labor unions, in connection with education as such. . . ."

And on page 24 of Tr. of Proc. and running into page 25:

"Q. I will ask you whether the Committee had before it any information of this character you just testified to regarding the defendant Herbert Simpson.

Mr. Lenske: I object to that, your Honor. . . .

The Court: Objection overruled. Go ahead and answer.

A. Yes, sir. The Committee was in possession of confidential information that Mr. Simpson had knowledge, extensive knowledge, of Communist activities in this area, and . . . We also were interested in hearing what Mr. Simpson had to say, because we had information that Mr. Simpson had been for some time in association with suspected Communists in this area; that he knew them, he knew their activities. . . . In connection therewith we had information, confidential information, that Mr. Simpson was a member of the Communist Party. That was borne out, that information, by sworn public testimony right in this building when we were here, where a Mr. Canon said—I have forgotten the name of the other witness—Mr. Owen—these two gentlemen both testified under oath that they knew or had information that the defendant here today, Mr. Simpson, had been a member of the Communist party and I believe, if I recall correctly, even on the State Central Committee of the Communist Party here in Oregon."

On pages 20 and 21 of Tr. of Proc. Mr. Kunzig testified:

"Mr. Carney: Q. What was the purpose of the hearing at Portland, Oregon?

Mr. Lenske: . . . That is objected to. . . .

The Court: Objection overruled. . . .

A. The Chairman, Harold H. Velde made an opening statement which I cannot quote verbatim.

It is in a public record. I don't know it by heart, but in general, from my own knowledge, the purpose of our hearing in Portland was to investigate in general subversive activities or Communist activities as they may exist in this part of the United States."

From Mr. Kunzig's testimony on pages 33 and 34:

"Mr. Carney: Q. What was the purpose of the inquiry of Mr. Herbert Simpson as to his residence?

A. We asked that question, sir, as we always do, to fix the identity of the witness. It is very important for the Committee to know who the witness is that is sitting before it. We may think that we know, but as happened very recently in Washington before another committee, just in the last few months, by the questions they brought out that the wrong man was sitting before the committee. We always ask for identification purposes that question, sir."

Following is some of Mr. Kunzig's testimony on pages 85 and 86:

"Mr. Lenske: Q. Now, after you inquired the name, would you make inquiry as to identifying questions further about the individual?

A. Always; as I have explained earlier today, the Committee desires to have clear identification of the person; where he lives, his education, and so forth and so on.

Q. Those are asked as identifying questions?

A. That is certainly one of the major purposes.

Q. Does that mean that there might be another Herbert Simpson . . . and your purpose is to identify this person through these means as that particular Communist and not another person?

A. Let me answer that this way: That many is the time—to use the name Herbert Simpson taken hypothetically—many is the time there turns out

to be five Herbert Simpsons in Portland, and we get telephone calls from the other four saying, 'Wait a minute. I am not the one that is in the Communist Party.' "

Mr. Kunzig's testimony on pages 35 and 36 of Tr. of Proc.:

"Mr. Carney: Q. I will ask you what was the purpose of the inquiry of the defendant as regarding these questions as to his education?

A. That question is almost always asked, sir, because the Committee is very interested in knowing the type of person that is testifying before it, the background of that person, and particularly the education. In other words, when the Committee is possessed of information that a person who is a witness himself has information about Communism or, as in this case, that the witness was actually a member of the Communist Party, then the Committee is greatly interested in knowing what type of person becomes a member of the Communist Party and is active in Communist affairs.

Mr. Carney: Q. I will ask you what was the purpose of the inquiry as to whether Herbert Simpson had been in the Armed Force of the United States?

A. Well, I am sure it is very clear that the Committee is interested, perhaps more than anything else, in the question as to whether there is any infiltration of Communism in our Armed Forces. That is of tremendous importance. So we asked Mr. Simpson as to whether he had ever been in the Armed Forces of the United States. We had information that he had been a member of the Communist Party, and since there was sworn testimony that he had been a member of the Communist Party, we wished to find out and inquire whether he was in the Armed Forces of the United States, perhaps while he was a member of the Communist Party, at any time."

Clearly the testimony in the instant case merits rehearing and reconsideration en banc in the light of the Starkovich, Gordon and Trock cases.

Respectfully submitted,

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No. 14,744

United States Court of Appeals

For the Ninth Circuit

DONALD M. WOLLAM,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S OPENING BRIEF.

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No. 14,744

United States Court of Appeals

For the Ninth Circuit

DONALD M. WOLLAM,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S OPENING BRIEF.

This is an appeal (R 32) from a judgment of conviction (R 31) for violation of 2 U.S.C.A. 192 by reason of appellant's alleged failure to answer certain questions propounded to him at a hearing of a Subcommittee of the House Committee on Un-American Activities. Appellant was sentenced to one year's imprisonment on each of five counts, the sentences to run concurrently, and to pay a fine of $250 on the first count (R 32).

JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court over the alleged offenses is conferred by 2 U.S.C.A. 192. The

jurisdiction of this Court over this appeal is conferred by 28 U.S.C.A. 1291, 28 U.S.C.A. 1294(1), and F.R. Crim. Pro. 37(a).

STATUTE INVOLVED.

The pertinent statute involved, 2 U.S.C.A., Section 192, provides as follows:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

STATEMENT OF THE CASE.

On June 19, 1954, appellant was called to testify as a witness before a widely publicized hearing of a Subcommittee of the House Committee on Un-American Activities at Portland, Oregon.[1] Prior to the

[1]The Subcommittee had just previously concluded hearings at Seattle, Washington. Convictions of contempt against two witnesses involved in the Seattle hearings were recently reversed by this Court. *Jackins v. United States,* 231 F.2d 405 (C.A. 9), and

assumption of the stand by appellant, the chairman had announced that it was the Subcommittee's purpose "to investigate Communist and subversive activities in this area [Portland]" (R 49).[2] The chairman further announced that "the Communist Party . . . is a conspiracy. It is designed to overthrow our form of government by force and violence."[3]

In addition to these statements by the chairman, there had been statements by Committee staff members, released just prior to the hearings and publicized in the Portland press, to the effect that the hearings would cover "general subjects" with perhaps some

Starkovich v. United States, 231 F.2d 411 (C.A. 9). Earlier the Subcommittee had conducted hearings in San Francisco, and a contempt conviction arising out of those proceedings was likewise reversed here. *Fagerhaugh v. United States*, 232 F.2d 803 (C.A. 9).

[2]The Subcommittee was operating pursuant to the provisions of Public Law No. 601, 79th Cong., and of House Resolution No. 5, adopted by the 83rd Congress, January 3, 1953 (Ex. 3). That law and that resolution purportedly authorized investigation into "Un-American propaganda activities . . . [and] . . . the diffusion . . . of subversive and Un-American propaganda . . ." See *infra*, p. 13.

[3]Hearings before the Committee on Un-American Activities, House of Representatives, 83rd Cong., 2d Sess., "Investigation of Communist Activities in the Pacific Northwest—Part 9 (Portland)", June 18, 1954, p. 6605. Although only portions of the entire transcript of the Portland proceedings were received in evidence below, clearly this Court may judicially notice the entire official records of a Congressional Committee. *Greeson v. Imperial Irrigation District*, 59 F.2d 529, 531 (C.A. 9); *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308 (C.A. D.C.); *Fletcher v. Jones*, 105 F.2d 58 (C.A. D.C.); *Cf. Tempel v. United States*, 248 U.S. 121, 130; *Home Building and Loan Association v. Blaisdel*, 290 U.S. 398, 444.

For the convenience of the Court, excerpts from the transcript of the proceedings in Portland are attached hereto as an appendix. These excerpts will be cited herein as "Hearings". For the testimony of appellant see notes 7a and 27-31, *infra*.

emphasis on education'' and would be concerned with ''proposals to prevent Communist domination of labor unions'' (R 84). When the hearing convened, the courtroom and the corridors were swarming with law enforcement officers including those who specialized in ''ferreting out subversion'' (R 85).[4]

Before appellant was called as a witness, three so-called ''friendly'' witnesses had given testimony. One, Barbara Hartle, had testified generally about the ''Communist conspiracy'', had given it as her opinion from a longtime association in the Communist Party that the party advocated the overthrow of the Government by force and violence, had testified about the Communist Party's ''concentration'' in the maritime industry (Hearing, p. 6649), and about Communist Party units at Reed College in Portland (Hearings, p. 6645). This witness testified concerning Communist Party activities among *high school* students as well (Hearings, p. 6645), and she also testified that the Civil Rights Congress was a Communist front organization (Hearings, pp. 6636-38).[5] Finally, she testified that when a Communist went ''underground'' he concealed his name, his *address,* his *age,* his *job,* his social security number, etc. (Hearings, p. 6643).

[4]Indeed, the close relationship between the Committee staff and the local ''Red Squad'' was acknowledged by the chairman at the conclusion of the hearings when he stated that the latter had ''helped us materially in investigative work'' (Hearings, Part 10 [Portland], June 19, 1954, p. 6723).

[5]Committee counsel announced that the Civil Rights Congress had been cited by the Attorney General as a subversive organization (Hearings, p. 6677).

Another witness, Homer Owen, testified to the existence of a Communist Party club at Reed College (Hearings, p. 6610), to the fact that Communist Party meetings were held at the homes of various members (Hearings, pp. 6610, 6622), and specifically at the home of Mrs. Don Wollam (Hearings, p. 6623), wife of appellant.[6]

The third "friendly" witness, Robert Canon, testified that appellant was a co-chairman of the Civil Rights Congress (Hearings, pp. 6675-76)[7] that there had been a Communist Party club at Reed College (Hearings, p. 6679), which met at the homes of various members (Hearings, p. 6680). He also testified that the homes of members were sometimes used as "mail drops" in the Communist Party "underground" (Hearings, pp. 6684-85, 6697).

This, then, was the "setting" (*Emspak v. United States,* 349 U.S. 190, 200; *Hoffman v. United States,* 341 U.S. 479, 488; *Jackins v. United States,* 231 F.2d 405, 407 [C.A. 9]) which confronted appellant when he was called as a witness. In addition, Committee counsel admitted that the reason appellant had been subpoenaed was because the Committee had "definite confidential information" that appellant had "associated with suspected Communists" (R 52). At the conclusion of his examination of appellant, the Com-

[6]Owens also testified that one John Rogers MacKenzie was a member of the Communist Party (Hearings, p. 6614), and MacKenzie was specifically asked whether Communist Party meetings were held at his home (Hearings, p. 6654). MacKenzie is an appellant in case No. 14,745 now pending in this Court.

[7]See *supra,* p. 4, n. 5.

mittee counsel asked whether or not it was true that appellant was "at this very minute . . . a section organizer of District 11 Committee of the State of Oregon Communist Party . . .?" (Hearings, p. 6719).

After he was sworn, appellant was asked to state his present address and he declined to answer that question upon the ground, among others, "of the Fifth Amendment" (Hearings, p. 6716).[7a] While there was an initial direction to answer this question before appellant had completed a full statement of his reasons for his refusal, there was no direction to answer after appellant had completed stating those reasons and had specifically cited the Fifth Amendment (Hearings, pp. 6716-17).

Appellant was next asked, "What is your present employment?", and again he refused to answer that question and based his refusal in part "on the Fifth Amendment" (Hearings, p. 6717). Again, although there was an initial direction to answer, the chairman did not repeat the direction after appellant had completed the statement of his reasons for refusal.

The third question put to appellant was, "Did you ever attend elementary school, and if so, where?" (Hearings, p. 6717). Again appellant refused to answer the question, and there was an extended colloquy between him and the chairman, in the course of which the chairman directed him to answer a question different from that put by the Committee counsel

[7a]The full transcript of appellant's testimony with respect to all five questions appears at pages 6716 to 6718 of the Hearings, and is reproduced below in full in footnotes 27 to 31, pages 30 to 35.

(Hearings, p. 6718) and never directed him to answer the question put by Committee counsel. In any event, appellant relied upon the "First and Fifth Amendments" in refusing to answer (Hearings, p. 6718). The fourth question asked appellant was, "Did you ever attend high school?" (Hearings, p. 6718), which appellant declined to answer for the reasons "cited earlier", and again, although he was directed to answer initially, the direction was not repeated after his completion of his statements for refusal. Finally, he was asked, "Did you ever attend college?", and appellant said that he refused to answer "for the same reason".

A series of questions all relating to appellant's alleged membership and activity in the Communist Party were also propounded, which appellant likewise refused to answer upon the ground that his answers might tend to incriminate him.

On July 23, 1954, the House of Representatives voted to certify appellant's refusal to answer the questions relating to his residence, employment and education, to the United States Attorney for prosecution (R 44, Ex. 5), and appellant was thereupon indicted for violation of 2 U.S.C.A. 192. The indictment charged that the questions were "pertinent to the question then under inquiry", and that appellant "refused to answer those pertinent questions" (R 3-4). The indictment did not allege how or in what manner the questions or any of them were pertinent to the inquiry, nor did it allege that appellant's refusal was wilful, unlawful or deliberate.

A motion to dismiss raising various points, including those raised on this appeal, was filed on behalf of appellant (R 5-6), as was a motion for the issuance of a *subpoena duces tecum* and for the inspection of documents in the possession of the Subcommittee's investigator (R 8-9). These motions were supported by affidavits (R 6, 10), the allegations of which were undenied. In the affidavits appellant asserted in effect that the Subcommittee already had the information it sought from him, that the questions were asked not to assist in the preparation of legislation, that in refusing to answer the questions appellant acted in good faith upon the advice of counsel and in the belief that he was entitled to the protection of the Constitution; and, with respect to the request for the *subpoena duces tecum,* that the evidence if produced would constitute a complete defense to the charge against him.[8] Both the motions were denied (R 19).[9]

[8]The purpose (R 9-10) of the application for the subpoena was to demonstrate that the information sought by the Committee was already in its possession—as the record clearly demonstrates (R 67). While it may be that as a matter of law the Committee nonetheless had the "right" to make inquiry of appellant, the evidence sought to be adduced is not to be totally disregarded in considering either the *bona fides* of the investigation (*cf. United States v. Icardi*, 140 F.Supp. 383, 389 [D.D.C.]) or the "wilfulness" of appellant's refusals. The denial of his motion for the *subpoena duces tecum* erroneously prevented him from showing, if he could, that the case came within this rule.

[9]The printed transcript does not contain a copy of the order denying the motion to dismiss the indictment. This motion was captioned in a companion case *"Herbert Simpson v. United States of America"*, now pending in this Court, No. 14,743. A typewritten copy of the transcript of the proceedings of December 29, 1954, during the course of which the Court below denied the motion to dismiss the indictment, is on file with the Clerk of this Court.

The matter thereupon came on regularly for trial and at the conclusion of the Government's case a motion for judgment of acquittal was made pursuant to Rule 29, F.R. Crim. Pro. and was denied (R 79-80). Appellant was subsequently found guilty on all counts. A motion for new trial on the grounds that the indictment did not charge an offense and that the evidence did not support the verdict and was contrary to the law, was made and denied (R 30-31). Thereafter, appellant was sentenced to imprisonment and to pay a fine (R 31), and this appeal followed (R 32).

SPECIFICATION OF ERRORS.

1. The Court below erred in denying appellant's motion to dismiss the indictment since the indictment failed to allege facts showing the pertinency of the questions asked of appellant.

2. The Court below erred in denying appellant's motions for a judgment of acquittal and for a new trial since the evidence failed to establish beyond a reasonable doubt that the questions asked of appellant were pertinent.

3. The Court below erred in denying appellant's motion to dismiss the indictment since the indictment failed to allege facts showing that appellant's refusal to answer the questions was wilful.

4. The Court below erred in denying appellant's motions for a judgment of acquittal and for a new trial since the evidence failed to establish beyond a

reasonable doubt that appellant's refusal to answer the questions was wilful.

5. The Court below erred in holding that appellant was not entitled to invoke the privilege against self-incrimination to the questions asked.

6. The Court below erred in holding that appellant had been properly directed to answer the first four questions after he had claimed the privilege against self-incrimination.

SUMMARY OF ARGUMENT.

I(a). The indictment is required to set forth facts establishing every essential element of an offense. *United States v. Cruikshank,* 92 U.S. 542; *Morisette v. United States,* 342 U.S. 246. It is an essential element of the offense charged by 2 U.S.C.A. 192 that the question be "pertinent" to the inquiry. *Sinclair v. United States,* 279 U.S. 296; cf. *Quinn v. United States,* 349 U.S. 155, 161. This indictment fails to allege any facts from which pertinency can be established. Cf. *United States v. Lamont,* 18 F.R.D. 27, 35 (S.D. N.Y.);[10] *Bowers v. United States,* 202 F.2d 447 (C.A. D.C.).

I(b). The proof fails to establish the pertinency of the questions asked. *United States v. Kamin,* 135

[10]This case was affirmed on August 14, 1956, *United States v. Lamont* (C.A. 2, Docket No. 23,955), in an opinion in which the Court of Appeals spoke of the opinion here relied on in these words: "Judge Weinfield's scholarly opinion is reported at D.C. S.D. N.Y., 18 F.R.D. 27" (Court of Appeals, Slip Opinion, pp. 2024-25).

F.Supp. 382, 389 (D. Mass).[11] Cf. *Quinn v. United States,* 349 U.S. 155, 161.

II(a). It is an essential element of the offense charged by 2 U.S.C.A. 192 that the refusal to answer be wilful, deliberate or intentional. *In re Chapman,* 166 U.S. 661, 672; *Quinn v. United States,* 349 U.S. 155, 165; cf. *United States v. Murdock,* 290 U.S. 389. This indictment fails to allege facts from which such wilfulness or deliberateness can be established. *United States v. Lamont,* 18 F.R.D. 27, 32 (S.D. N.Y.)

II(b). The proof fails to establish beyond a reasonable doubt that appellant acted wilfully, *United States v. Murdock,* 290 U.S. 389.

III. In determining whether appellant was entitled to invoke the privilege against self-incrimination the Court must look to the "setting" in which the questions were asked. *Hoffman v. United States,* 341 U.S. 479; *Emspak v. United States,* 349 U.S. 190. In the setting revealed by this record, appellant was entitled to invoke the privilege. *Blau v. United States,* 340 U.S. 159; *Bart v. United States,* 349 U.S. 219; *Alexander v. United States,* 181 F.2d 480 (C.A. 9); *Jackins v. United States,* 231 F.2d 405 (C.A. 9); *Starkovich v. United States,* 231 F.2d 411 (C.A. 9). Appellant was therefore entitled to a judgment of acquittal.

IV. The Committee did not "demand" that appellant answer at least the first four questions after he

[11]The Court of Appeals for the Second Circuit said of Judge Aldrich's opinion in the *Kamin* case, that its reasoning was "convincing" and that his statement of the law was "cogent". *United States v. Lamont* (C.A. 2, Docket No. 23,955), Slip Opinion, p. 2031).

had invoked the privilege against self-incrimination. *Quinn v. United States,* 349 U.S. 155; *Fagerhaugh v. United States,* 232 U.S. 803 (C.A. 9). On the contrary, with respect to at least those questions, it "abandoned" the inquiry and turned to other matters without insisting upon an answer. Appellant was therefore entitled to a judgment of acquittal thereon. *Fagerhaugh v. United States, supra.*

ARGUMENT.

I.

THE INDICTMENT DID NOT PROPERLY CHARGE, NOR DID THE PROOF ESTABLISH, THE PERTINENCY OF THE QUESTIONS ASKED OF APPELLANT. (Specification of Errors 1 and 2.)

(a) The indictment did not properly charge the pertinency of the questions asked of appellant.

The statute under which appellant was prosecuted makes pertinency an essential element of the offense.[12] The Supreme Court has held that under this statute it is "incumbent upon the United States *to plead* and show that the question pertained to some matter under investigation" (*Sinclair v. United States,* 279 U.S. 263, 296-97).[13] This proposition has been universally accepted as the law in the lower federal courts. *Bowers v. United States,* 202 F.2d 447 (C.A. D.C.);

[12] 2 U.S.C.A. 192 punishes the refusal to answer "any question *pertinent* to the questions under inquiry."

[13] Indeed, if the statute did not so require, the Constitution undoubtedly would impose such a requirement upon the prosecution. Cf. *Kilbourn v. Thompson,* 103 U.S. 168, 192-93; *McGrain v. Daugherty,* 273 U.S. 135, 173; *United States v. Rumely,* 345 U.S. 41, 46; *Quinn v. United States,* 349 U.S. 155, 161.

United States v. DiCarlo, 102 F.Supp. 597 (N.D. Ohio); *United States v. Kamin*, 135 F.Supp. 382 (D. Mass.); *United States v. Lamont*, 18 F.R.D. 27 (S.D. N.Y.); cf. *Seymour v. United States*, 77 F.2d 577 (C. A. 8); *Marcello v. United States*, 196 F.2d 437 (C.A. 5); *United States v. Orman*, 207 F.2d 148 (C.A. 3).

The requirement, springing from the Sixth Amendment and from Rule 7(c) F.R. Crim. Pro., that every essential ingredient of the offense be pleaded in the indictment, is not a mere technicality, but rather a matter of substance of the utmost importance. *United States v. Cruikshank*, 92 U.S. 542; *United States v. Carll*, 105 U.S. 611; *United States v. Hess*, 124 U.S. 483; *Morisette v. United States*, 342 U.S. 246.

In the case at bar the indictment is defective for failing to plead *facts* from which pertinency can be determined. Its reference to "Public Law 601, . . . and to H. Res. 5 . . ." (R 3) does not cure the defect. Those enactments merely set up the Committee and authorize it to investigate "(i) the extent, character and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of a form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto . . ." They do not establish the pertinency of the questions asked.

The fact that the indictment is generally in the language of the statute (2 U.S.C.A. 192) and makes reference to the enactments under which the Commit-

tee operates (P.L. 601 and H. Res. 5) "does not dispense with the necessity of alleging in the indictment all the *facts* necessary . . ." (*United States v. Carll, supra,* at 612-13).

It is impossible to determine from the indictment or the enactments how the questions asked of appellant relating to his residence, employment or education are relevant or pertinent to the inquiry authorized. Or, to put it conversely, ". . . the indictment is barren of any allegation of *fact* from which the authority of the . . . Subcommittee to conduct the inquiry can be ascertained" (*United States v. Lamont, supra,* at 35).

It will not do to suggest that answers to the questions sought, while in themselves not necessarily pertinent, might have led to other information conceivably pertinent. Such an approach to the question at bar would effectively destroy the requirement of pertinency, for any question put might conceivably lead to something relevant. *Bowers v. United States,* 202 F. 2d 447, 448 (C.A. D.C.); *United States v. Kamin,* 135 F.Supp. 382, 388-89 (D. Mass.).

For the foregoing reasons it is clear that the indictment failed to state *facts* sufficient to constitute an offense against the United States and that the motion to dismiss it should have been granted.

(b) The proof did not establish the pertinency of the questions asked of appellant.

As we have seen, the Government is required both to plead and "show" the facts establishing the pertinency of the questions asked. *Sinclair v. United*

States, 279 U.S. 263, 296-97. We have demonstrated above that the indictment failed to meet this test. We submit also that the proof was equally defective.

In an effort to establish the pertinency of the five questions, the Government, at the trial, inquired of Committee counsel as to the purposes for which the questions were asked. With respect to the questions concerning appellant's address and his present employment, Committee counsel stated that those questions were asked in order to identify the witness (R 57-58). With respect to the three questions concerning appellant's school attendance, Committee counsel stated that the Committee desired to know the extent of appellant's education in order to determine whether people who were involved in Communist activities are "educated" people (R 59).

It is hard to see how it was relevant or pertinent to the purposes of the Committee as outlined in the law and resolution creating it to determine who appellant was, where he lived, or where he had gone to school.

We are here dealing with a criminal offense and in determining whether the questions here were pertinent, the enactments authorizing the inquiry must be strictly construed. *United States v. Resnick,* 299 U.S. 207. Otherwise, the apparent breadth of the authorizing legislation may give rise to serious constitutional questions since the power to investigate is subject to definite constitutional limitations.

In a recent case involving the same law and resolution as is here presented the Supreme Court has said

that Congress' investigative power "cannot be used to inquire into private affairs unrelated to a valid legislative purpose" (*Quinn v. United States,* 349 U.S. 155, 161).[14] The inquiry here was clearly into appellant's "private affairs"—his residence, employment, education. There was no showing at the trial that these questions, dealing with matters of private concern to appellant, were pertinent to any proper Congressional inquiry, or indeed, how the answers sought would aid the Committee in discharging the tasks assigned to it by the law and the resolution. Where Donald Wollam lived or worked or where or whether he went to grammar school, can hardly be pertinent either to any valid legislative purpose or to the inquiry contemplated by the law and the resolution.

If it be argued that answers to these questions might lead to pertinent information, the answer is to be found in the cases already cited under Sub-Point (a) page 14, above. Indeed, as was said in *United States v. Kamin,* 135 F.Supp. 382 at 389:

> "The suggestion made in argument that a hostile witness could be asked an apparently impertinent question, or one in which any possible pertinence was remote, so that he would be lulled into answering it, may be good trial tactics, but it does not fall within the scope of the statute."

In the absence of proof establishing beyond a reasonable doubt how these questions were pertinent to the authority of the Congressional Committee as set

[14]Other constitutional limitations, not relevant to this particular point, were also suggested (349 U.S. at 161-62).

forth in the public law and resolution, appellant was entitled to a judgment of acquittal or to a new trial, and the denial of his motions for such relief was error.

II.

THE INDICTMENT FAILED TO ALLEGE, AND THE PROOF TO ESTABLISH, THAT APPELLANT'S REFUSAL TO ANSWER THE QUESTIONS WAS WILFUL. (Specification of Errors 3 and 4.)

(a) The indictment failed to allege that appellant's refusal to answer the questions was wilful.

While the word "wilfully" in the statute appears to modify only the clause relating to failure to appear,[15] the Supreme Court has held that a criminal intent is required before a witness may be found guilty of violating either portion of the statute. *Sinclair v. United States,* 279 U.S. 263, 299. It has said that the element of deliberateness is essential to a prosecution such as this. *In re Chapman,* 166 U.S. 661, 672; *Quinn v. United States,* 349 U.S. 155, 156.

Here the indictment failed, to plead either by way of fact or even conclusion, that the refusal was "wilful" or even that it was "deliberate" or "intentional". On the basis of the authorities already cited, Point I (a), page 13, above, the indictment was therefore fatally defective and it was error to deny the

[15]"Every person who . . . wilfully . . . makes default, or who, having appeared, refuses to answer . . . shall be deemed guilty . . ." (2 U.S.C.A. 192).

motion to dismiss it. *United States v. Lamont,* 18 F.R.D. 27, 32 (S.D. N.Y.).

(b) The proof failed to establish that appellant's refusal to answer the questions was wilful.

The record of the proceedings before the Subcommittee shows that appellant's refusal was not wilful as that term has been interpreted by the Supreme Court.

In *United States v. Murdock,* 290 U.S. 389, a conviction was reversed because of a refusal to instruct that, in determining whether the defendant's refusal was wilful, the jury was to consider whether "the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief" (290 U.S. at 393). The Court said it was error to refuse such an instruction because as a matter of law the word "wilful" means "an act done with a bad purpose . . .; without justifiable excuse . . .; stubbornly, obstinately, perversely . . .; a thing done without ground for believing it lawful . . .; conduct marked by careless disregard whether or not one has the right so to act" (290 U.S. at 394-95).

The record here shows that at no time did appellant behave in a manner to warrant such a characterization of his conduct. On the contrary, he not only relied upon advice of counsel, but he advanced serious constitutional objections for his refusals to answer. We shall demonstrate below that those objections were well taken, and that in itself will be dispositive of this appeal. But be that as it may, it is clear from the record now before this Court that the reasons given

by appellant for his refusals to answer were given in good faith and were based upon his actual belief that such reasons were valid. He so asserted under oath,[16] and there is no evidence from which a contrary finding could have been made.

This element of wilfulness is particularly important in a case such as this where the witness is called upon to exercise the highest degree of legal skill, lest on the one hand he commit a contempt by a premature assertion of a constitutional privilege, or on the other, he answer a question which might result in his waiver of that privilege. Cf. *Rogers v. United States,* 340 U.S. 367, 378; *United States v. St. Pierre,* 132 F.2d 837 (C.A. 2).[17] Since the privilege which was here asserted "must be accorded liberal construction in favor of the right which it was intended to secure" (*Hoffman v. United States,* 341 U.S. 479, 486), and since it is not to be applied "narrowly or begrudgingly", or "treated as an historical relic" (*Quinn v. United States,* 349 U.S. 155 at 162), it cannot be said that a good faith invocation of the privilege, even if, as the Government will undoubtedly argue, it was premature, is evidence of that wilfulness or deliberateness required by the statute.

In the absence of evidence that appellant's refusals to answer were wilful and deliberate, indeed in the face of evidence that he relied in good faith upon his

[16]Both in his testimony before the Subcommittee and in his affidavit in support of his motion to dismiss the indictment (R 7).

[17]"Plainly a witness need not have the skill of a lawyer to invoke the protection of the Self-Incrimination Clause" (*Quinn v. United States,* 349 U.S. 155, at 162).

belief that he had a right to invoke the privilege, the evidence plainly was insufficient. Appellant's motion for a judgment of acquittal or for a new trial should have been granted.

III.

APPELLANT WAS CLEARLY ENTITLED TO INVOKE THE PRIVILEGE AGAINST SELF-INCRIMINATION. (Specification of Error 5.)

A. The "setting" in which the questions were asked and the reasonableness of the fear of self-incrimination.

At this late date there can be no disputing the proposition that in order to sustain a claim of the privilege, such as was here asserted, "it need only be evident *from the implication of the question, in the setting in which it is asked,* that a responsive answer to the question or an explantion of why it cannot be answered *might* be dangerous because injurious disclosure *could* result" (*Hoffman v. United States,* 341 U.S. 479, 486-87). This test has been consistently applied for almost one hundred and fifty years. *United States v. Burr,* 25 Fed. Cas. 38, 40 (C.C. Va., per Marshall, C.J.); *Arndstein v. McCarthy,* 254 U.S. 71, 72; *Quinn v. United States,* 349 U.S. 155, 198-99; *Emspak v. United States,* 349 U.S. 190; *Maffie v. United States,* 209 F.2d 225, 231 (C.A. 1); *United States v. Weisman,* 111 F.2d 260, 261 (C.A. 2); *United States v. Coffey,* 198 F.2 438, 440 (C.A. 3); *Estes v. Potter,* 183 F.2d 865, 867 (C.A. 5); *Aiuppa v. United States,* 201 F.2d 287, 289 (C.A. 6); *Kiewell v. United States,* 204 F.2d 1, 5 (C.A. 8). This rule was clearly

stated in this circuit at the beginning of this decade in a series of cases involving grand jury investigations into Communist and subversive activities (*Alexander v. United States,* 181 F.2d 480 [C.A. 9]; *Doran v. United States,* 181 F.2d 489 [C.A. 9]; *Kasinowitz v. United States,* 181 F.2d 632 [C.A. 9]; *Healey v. United States,* 186 F.2d 164 [C.A. 9], and was recently reiterated in two cases arising out of the hearings of this very Subcommittee which took place in Seattle just prior to the hearings here involved (*Jackins v. United States,* 231 F.2d 405 [C.A. 9]; and *Starkovich v. United States,* 231 F.2d 411 [C.A. 9]).

An examination of the "setting" is therefore required in order to determine whether appellant's claim of the privilege was validly asserted. We have already summarized what had transpired prior to the time appellant was called to the witness stand (supra, pp. 2-7). It is clear that appellant had good faith reasons for believing that there was evidence tending to show (1) that Communists were seeking to "infiltrate" educational institutions, trade unions, and industry in general and the maritime industry in particular;[18] (2) that Communist Party units in the Portland area met at the *homes* of various members, including the home of appellant's wife, Mrs. Don Wollam; (3) that homes of Communist Party members were used as "mail drops" for the "underground"; (4) that there were Communist Party units

[18]It will be noted that appellant was apparently employed in the maritime industry (R 67) and was suspected of "infiltration" (R 50-51).

at Reed College in Portland; (5) that appellant, together with a person formerly associated with such Communist Party units had been a co-chairman of the Civil Rights Congress; (6) that the Civil Rights Congress was a Communist Party front organization and had been so designated by the Attorney General of the United States; (7) that the Communist Party was an international conspiracy which advocated not only forcible overthrow of government, but sabotage and possibly wartime espionage. The record may indeed be susceptible of a finding that appellant had good reason to believe that there was evidence tending to establish even further matters of this kind, but certainly the foregoing cannot be denied and is, we submit, more than an ample basis for the invocation of the privilege against self-incrimination.

It is clear that there are many crimes against the United States which a prosecutor could "conceivably . . . building on the seemingly harmless answer" (*United States v. Coffey,* 198 F.2d 438, 440 [C.A. 3]), fasten upon appellant. Among those crimes are various violations of the Smith Act (18 U.S.C.A. 2385), espionage (18 U.S.C.A. 793, *et seq.*), sabotage (18 U.S.C.A. 2151, *et seq.*), treason (18 U.S.C.A. 2381), seditious conspiracy (18 U.S.C.A. 2384), and many others.[19]

[19]At about the time appellant was before the Committee, Congress was considering the Communist Control Act of 1954, 50 U.S.C.A. 841, *et seq.,* which

> ". . . enlarged even more the basis for claim of privilege, for it prescribes fourteen indicia of Communist membership. Some of them are entirely innocent of themselves, yet each is now declared by law to be evidence of membership, and

Nor must it be forgotten, in assessing the setting, that the very physical circumstances in which the interrogation took place put appellant on notice of the purpose of the Committee and others to establish his connections with the Communist movement. We refer not only to the announcement of the chairman and the press stories respecting the nature and purpose of the hearing,[20] but also to the presence of law enforcement officers charged with ferreting out subversion. As this Court recognized in *Jackins v. United States,* 231 F.2d 405, 409 (C.A. 9), in reliance upon *Hoffman v. United States,* 341 U.S. 479, 489, and *Aiuppa v. United States,* 201 F.2d 287, 299 (C.A. 6), the attendance of law enforcement officers and investigators for prosecuting agencies is a matter not to be overlooked in weighing the good faith of the witness' claimed fear of incrimination.

B. Answers to the questions asked could have incriminated appellant.

1. It requires no great acumen to perceive that if appellant had answered the question concerning

in conjunction they seem to provide a virtually unlimited basis for invoking the Fifth Amendment" (Telford Taylor, *Grand Inquest,* Simon & Schuster, 1955, p. 204).

At the time he testified Congress had not yet enacted the Immunity Statute, 18 U.S.C.A. 3486, pursuant to which the Committee might have tendered appellant immunity from prosecution for any of the crimes mentioned above. Cf. *Ullman v. United States,* 350 U.S. 422. Of course, no such immunity was ever offered to appellant.

[20]Matters which this Court has said it is error to ignore in cases of this kind. *Alexander v. United States,* 181 F.2d 480 (C.A. 9); *Doran v. United States,* 181 F.2d 489 (C.A. 9); *Kasinowitz v. United States,* 181 F.2d 632 (C.A. 9); *Healey v. United States,* 186 F.2d 181 (C.A. 9). Cf. *Emspak v. United States,* 349 U.S. 200.

his address, he might have identified his home as a place where Communist Party clubs conducted meetings or as a place to which he had repaired as a member of the Communist "underground", or perhaps as a place which the "underground" used as a "mail drop". All such matters had been already testified to before appellant was called as a witness.[21] The question as to appellant's residence appears to present a problem in no way analytically different from the similar question presented by the record in *Starkovich v. United States,* 231 F.2d 411 (C.A. 9). There this Court held that in the "setting" in which the question was asked—a setting indistinguishable from that presented by this record—the witness had a justifiable fear of incrimination and reversed the conviction.

2. As to the question relating to his employment, we need hardly pause over the evidence the Committee already had, and the further evidence it was seeking with relation to Communist Party infiltration in unions or on the waterfront; for any conceivable uncertainty is resolved by a consideration of the last questions put to appellant by Committee counsel:

> ". . . isn't it true that you are today—this very minute . . .—a section organizer of District 11

[21] In one of its briefs in several of the Smith Act cases presently pending before the Supreme Court, the Government cites, as evidence to support convictions under that statute, testimony relating to "facilities" in the "underground organization" relating to "hiding places and contact places [for] party leaders . . ., drop places where party material can be dropped and picked up . . ." (Brief for the United States, *Yates, et al. v. United States,* Supreme Court, October Term, 1956, Nos. 6, 7 and 8, p. 172).

Committee of the State of Oregon Communist Party?

* * *

"Mr. Wollam, have you ever engaged in espionage activities against the United States?" (Hearings, pp. 6719-20).

Indeed, even if his employment were "innocent", appellant might have obtained it as part of his disguise in the "underground". Such matters, too, had been testified to before appellant was called. The question as to appellant's employment therefore appears to be in no respect different from the question involved in the first count in *Jackins v. United States,* 231 F.2d 405 (C.A. 9). There this Court had no difficulty in finding that the setting justified the invocation of the privilege against a seemingly innocuous question as to employment history (231 F.2d at 407). The conviction there was reversed with directions to enter a judgment of acquittal.[22]

3. In view of the emphasis which the investigation had placed upon Communist Party infiltration into the educational system, and in view of the testimony already given connecting appellant as co-chairman of a subversive group together with the former Director of Admissions and Dean of Students at Reed College, his refusal to answer questions regarding his educational background was clearly privileged. Indeed, if appellant had the kind of contacts and associations

[22]In the earlier cases cited, *Alexander, Doran, Kasinowitz,* and *Healey, supra,* pp. 3-4, this Court sustained a claim of the privilege against questions seeking information about employment in settings not dissimilar to that presented here.

with Communists which Committee counsel claimed, his answers to these questions might well have revealed them. He was therefore privileged not to answer these questions as well.

If it be suggested that the two questions relating to appellant's pre-college education were too "remote" to justify the invocation of the privilege, it need only be remembered first, that the cases have held that an answer which could conceivably furnish a "link in a chain" need not be given; second, that the cases have held that the privilege is not to be "begrudgingly" applied or a witness stripped of its protection by skillfully drawn questions which might entrap him; and third, that the Attorney General and the Committee have never suggested that Communist infiltration or indoctrination is limited to educational institutions on a college level. Indeed, the Attorney General's list of subversive organizations contains reference to groups of young people of elementary and secondary school age,[23] as do publications of Congressional Committees dealing with this and related problems.[24]

[23]See, e.g., List of Organizations Designated by the Attorney General Pursuant to Executive Order No. 9835, 5 C.F.R. § 210.15, Appendix A, which includes among others: American Youth Congress, American Youth for Democracy, Connecticut State Youth Conference, Socialist Youth League, Southern Negro Youth Conference, Youth Communist League.

[24]See, for example, Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, 82nd Cong., 1st and 2nd Sess.—Communist Tactics in Controlling Youth Organizations (Gov. Printing Office, 1952), pp. 24-25, 210-217, dealing with "sub-

In view of the foregoing, it is clear that appellant's claim of the privilege was properly invoked. For, as was said in *Hoffman v. United States,* 341 U.S. 479, at 488:

> "In this setting it was not '*perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot *possibly* have such tendency' to incriminate."

A very recent case in New York throws a good deal of light on the point. There the Court of Appeals affirmed a contempt conviction for a refusal to answer questions propounded in a grand jury proceeding. *United States v. Trock,* 232 F.2d 839 (C.A. 2). District Judge Galston held, with the reluctant concurrence of Chief Judge Clark, and over the vigorous dissent of Circuit Judge Medina that the defendant had made his claim of the privilege "prematurely"; and that before he could validly refuse to answer them, the questions were required "to present a 'hot pursuit' " situation (232 F.2d at 843). In a well-reasoned dissent Judge Medina pointed out how the position taken in the affirming opinions—the requirement that the questions themselves show that the prosecution was in "hot pursuit"—was contrary both to the decided cases and to the underlying rationale of the Fifth Amendment.

version" in high schools and at an even younger age level. Indeed, the record at bar contains an identification of others beside college students as members of the Communist unit at Reed College (Hearings, p. 6612).

Judge Medina concluded his dissent by saying:

> "Despite all the hue and cry against the Fifth Amendment it still stands as one of our fundamental constitutional rights and we must be zealous to preserve it, rather than to weaken and dilute it by interpretations of doubtful validity" (232 F.2d at 846).[25]

The subsequent history of this case is most significant, representing as it does the latest expression of the Supreme Court's views on the issues here presented. On a petition for writ of certiorari to review the holding of the Second Circuit, the Supreme Court on June 11, 1956, the last day of its last term, entered the following order:

> "Per Curiam: The petition for writ of certiorari is granted and the judgment is reversed. Hoffman v. United States, 341 U.S. 479, 95 L.ed. 1118, 71 S.Ct. 814" (*Trock v. United States,* 351 U.S. 976).

It is significant that the Court did not even set the matter down for argument on the merits, but instead, regarding the question as closed, summarily directed a reversal. The law is so well established now that there was nothing else for the Court to do.[26]

[25]Judge Medina recently delivered the Alexander Morrison Lecture at the 1956 annual convention of the California State Bar. At a press interview in connection with this event, the judge is quoted as saying:

> "I would rather see every single Communist go scott free than abandon, diminish or dilute a single one of our constitutional amendments, and that includes the Fifth Amendment" (*The Recorder*, September 21, 1956).

[26]Such summary reversal occurs "where the decision below is so clearly erroneous as to make argument before the Court a waste of time" (Stern & Gressman, *Supreme Court Practice* [2d ed.], p. 156).

Appellant's claim of the privilege here was clearly valid, and his motion for a judgment of acquittal was erroneously denied.

IV.

THE APPELLANT WAS NOT PROPERLY DIRECTED TO ANSWER THE QUESTIONS REFERRED TO IN COUNTS I THROUGH IV OF THE INDICTMENT.

As an additional reason for requiring the reversal of the judgment, with direction to enter a judgment of acquittal respecting the questions involved in the first four counts of the indictment at least, it is submitted that the record fails to show the necessary "demand" for answer after appellant's invocation of the privilege. Under recent decisions of the Supreme Court and of this Court, appellant was therefore entitled to a judgment of acquittal. *Quinn v. United States,* 349 U.S. 155; *Emspak v. United States,* 349 U.S. 190; *Bart v. United States,* 349 U.S. 219; *Fagerhaugh v. United States,* 232 F.2d 803 (C.A. 9); *Jackins v. United States,* 231 F.2d 405, 406-07 (C.A. 9).

These cases, so recently decided, are undoubtedly so fresh in the Court's mind as to require no great rehearsal of their holdings here. Suffice it to say that they require as a precondition of a contempt conviction that the Committee "clearly" apprise the witness that despite his objections it "demands" his answer. This the Committee here failed to do, at least with respect to the questions embraced in the first four counts of the indictment.

1. As to the first question, the situation was that after it was put, appellant commenced to state his grounds for refusing to answer. Before he had completed his statement, indeed before he had made his claim of the privilege under the Fifth Amendment, he was directed to answer the question. After that direction he asked leave to "continue my reasons for not answering that question" (Hearings, p. 6716).[27]

[27]The entire colloquy with respect to the first question is here set out:

Mr. Kunzig. Thank you, Mr. Goodman. Mr. Wollam, what is your present address, sir?

Mr. Wollam. Mr. Kunzig, I refuse to answer that question on the first, under the fourth amendment because I believe that counsel is aware that people who have given their address over this microphone both here and in Seattle have had their homes threatened. I have a wife and family at home who I don't propose to put in jeopardy because of any action I may take here.

Mr. Kunzig. Just shorten it up.

Mr. Velde. You may state your legal grounds.

Mr. Wollam. I don't like your question, Mr. Kunzig, and I will certainly not surrender to you any right that I may have to——

Mr. Velde. You may state your legal grounds, young man, but we're not going to listen to another tirade. Do you have contempt in you heart, when you approach the witness stand, do you have contempt in your heart for this Committee of your United States Congress?

Mr. Wollam. I refuse to answer that question on the grounds of the fifth amendment, the decision of United States judge, James Alger Fee, in the case of the United States versus——

Mr. Velde. It is apparent that this witness is trying to filibuster. We just can't have that, as I pointed out the other day.

Mr. Kunzig. Mr. Chairman, I respectfully request, in order that the record may be clear and that the witness be warned that there is possible contempt here that he be directed to answer the question as to, that I have just asked, as to his address.

Mr. Velde. Yes. You are certainly directed to answer that question.

Mr. Wollam. Mr. Chairman, I ask to continue my reasons for not answering that question.

He thereupon and for the first time, cited the Fifth Amendment as the ground for refusing to answer, At no time thereafter was he told that nonetheless his answer was demanded. After some further colloquy, none of which included a demand that he answer the question, the chairman directed Committee counsel to "proceed to ask the questions", and Committee counsel put the next question (Hearings, p. 6717).

This situation is identical with that presented in *Fagerhaugh v. United States,* 232 F.2d 803 (C.A. 9) where, at 804, it is pointed out that while there was a direction to answer *before* the claim of the privilege against self-incrimination, there was none after that privilege had been asserted. As that conviction was reversed, so must this one be.

Mr. Velde. You have already stated sufficiently the grounds. Now do you refuse to answer?

Mr. Wollam. I have only stated the fourth amendment.

Mr. Velde. Do you refuse to answer upon direction the question as to your address?

Mr. Wollam. I do refuse to answer that question. First on the grounds that I have just stated under the fourth amendment to the Constitution. Secondly I refuse to answer again on the grounds that I have just stated regarding the Alger Fee decision. I refuse to further answer that question under the 1st, the 5th, the 9th, and the 14th amendments to the Constitution of the United States and any other sections of the Constitution that may apply, and also the constitution of the State of Oregon.

Now this may be funny to you, Mr. Kunzig.

Mr. Kunzig. It is not funny.

Mr. Velde. It is very, very serious.

Mr. Kunzig. It is very, very serious.

Mr. Velde. You are the one who is taking this as being funny.

Mr. Wollam. I certainly have no intentions——

Mr. Velde. Proceed to ask the questions, Mr. Counsel." (Hearings, pp. 6716-17.)

2. The situation with respect to the second question is much the same.[28] Although in this case the direction to answer came after the witness had claimed his Fifth Amendment privilege, it came before he had completed assigning all of his reasons for his refusal to answer. Indeed, while he was still stating the balance of his reasons for his refusal, the chair apparently acquiesced, for it interrupted him and said to Committee counsel, "All right, proceed, Mr. Counsel" (Hearings, p. 6717).

It is submitted, with respect to this question that the Committee "abandoned the question and pro-

[28]The full colloquy is:

"[Mr. Kunzig.] Now, Mr. Wollam, what is your present employment? I am asking that question very seriously.

Mr. Wollam. And I will give you a very serious answer.

Mr. Kunzig. Thank you.

Mr Wollam. Mr. Kunzig, I refuse to answer it not just on the fifth amendment, as you stated that you would understand my refusals would be based upon, but upon all of the grounds that I have previously stated.

Mr. Kunzig. All right. Mr. Chairman, may I ask you to please direct the witness to answer the question as to where he is presently employed.

Mr. Velde. Yes; you are directed to answer the question as to your employment at the present time.

Mr. Wollam. I refuse to answer the question upon the grounds of the first and fifth amendment to the Constitution of the United States pursuant to article 1, section 10, Constitution of Oregon, which provides in part; that every man shall have——

Mr. Velde. Isn't your refusal——

Mr. Wollam (continuing). Remedy by due course of law for injury done him——

Mr. Velde. Will the witness listen to me for just a minute? Is your refusal to answer based upon the same reasons that you gave before? Is that right?

Mr. Wollam. My refusal to answer is based upon the reason that I just gave plus all else that I have pled here, and I beg leave, Mr. Chairman, I beg leave——

Mr. Velde. All right, proceed, Mr. Counsel." (Hearings, pp. 6717.)

ceeded to inquire about other matters" (*Fagerhaugh v. United States, supra,* at 805). Thus appellant may not now be held in contempt for his refusal to answer.

3. With respect to the third question the record reveals a direction to answer a question different from the one originally put, and a failure to direct an answer after the claim of the Fifth Amendment privilege had been clearly made.[29] On the contrary, after

[29]"Mr. Kunzig. Now Mr. Wollam, the next question is as follows: Did you ever attend elementary school and if so where?

(Witness confers with counsel.)

Mr. Wollam. Mr. Chairman, in the dissenting opinions of Justices Douglas, Black, and Frankfurter the line of demarcation——

Mr. Velde. Young man, we are not going to listen to a long diatribe or a lot of advice on what the law is, as far as the Supreme Court decisions are concerned. Either answer the questions or refuse to answer. I will say this that if you will answer the questions as put to you by our counsel, then you might have the opportunity to go ahead and explain the law or anything that you want to, but you must first of all give us the courtesy of giving us an answer. By that I mean an answer of yes or no.

Mr. Wollam. I have refused to answer the question Mr. Chairman and I ask you for the courtesy of being permitted to state my reasons.

Mr. Velde. You have stated the reasons.

Mr. Wollam. I think these reasons are quite important. They are very important to me.

Mr. Velde. Will you proceed, Mr. Counsel?

Mr. Kunzig. Mr. Chairman, I think that we also ought to note that he was citing the dissenting opinions. This committee usually tries to follow the majority opinion of the Supreme Court.

Now on the last question you have refused. Now let me ask you this. Mr. Chairman, I have forgotten the record. Have you directed him to answer the question as to whether he went to the elementary school or not?

Mr. Velde. No.

Mr. Kunzig. Would you please direct him?

Mr. Velde. You are directed to answer the question as to where you attended elementary school, or whether you attended elementary school.

appellant made that claim, the chairman accused him of making "wild and absurd and ridiculous statements"; said, "[w]e are not going to listen to anything further"; and asked Committee counsel if he had any other "important" questions he wanted to ask. Committee counsel thereupon proceeded with further questions (Hearings, p. 6718). Again, there appears to have been no clear demand that the question be answered. Rather, it appears that the Committee abandoned the question and asked another one.

4. The record with respect to the fourth question[30] reveals the same failure to make the required demand

Mr. Kunzig. The question was where you attended and where was the exact way that I put it.

Mr. Wollam. Mr. Chairman, in view of the fact that I have no way of knowing as what time when I answer a question I will be waiving my rights to refuse to answer further questions that I know will follow from this committee, and since I have no intention of becoming a member of your stable of stool pigeons I am going to stand upon my constitutional rights and decline to answer the question upon the grounds of the first and fifth amendments and——

Mr. Velde. Now we are not going to listen to any more of this diatribe such as calling us a stable of stool pigeons. I am sure that your mother wouldn't appreciate your saying something like that and I am sure that the rest of the decent people in this area don't appreciate your making such wild and absurd and ridiculous statements, and so we are not going to listen to anything further.

Counsel, do you have any other important questions that you want to ask this witness?" (Hearings, pp. 6717-18).

[30] "[Mr. Kunzig]. Did you ever attend high school, Mr. Wollam?

(Witness confers with counsel.)

Mr. Wollam. As an overseas war veteran, Mr. Chairman; 11 months in German prison camp, I stand upon the Constitution of the United States, the same provisions that I cited earlier.

Mr. Kunzig. Now did you ever attend college, Mr. Wollam? Mr. Chairman, will you please direct the witness to answer that question?

after the witness had made his claim of the privilege, as well as an apparent abandonment of the question, since it shows that the witness was interrupted in his explanation and a new question put to him.

It is submitted that the record in this case reveals that as to each of the first four questions[31] there was not such a clear, definite and unambiguous "demand" from the Committee as to invest appellant's refusal with that wilfulness required to be present before a conviction may be sustained. For this additional reason the convictions on the first four counts cannot stand.[32]

Mr. Velde. Yes, you are directed to answer the question as to your—was it high school? Was that the last question?

Mr. Kunzig. Yes, high school. The question exactly as it appears in the record.

Mr. Wollam. And I will again decline to answer and on the same grounds that I gave before. And I might add, Mr. Chairman, that if you are interested——" (Hearings, p. 6718).

[31]The record as to the fifth question reads quite simply:

"Mr. Kunzig. Did you ever attend college?

Mr. Wollam. The same answer and the same reason.

Mr. Kunzig. I respectfully request that the witness be directed, Mr. Chairman, to answer the question.

Mr. Velde. Yes, you are directed to answer.

Mr. Wollam. I refuse to answer, Mr. Chairman, same reason" (Hearing, p. 6718).

[32]As in *Jackins v. United States*, 231 F.2d 405 (C.A. 9), the judgment of conviction on the various counts may be reversed on a variety of different grounds. The argument made in this point as to the first four counts of the indictment is not intended to, and does not detract from the validity of the arguments heretofore made. Instead, it supplements them and gives an additional ground for reversal as to the first four counts. For each or any of the reasons set forth in Points I, II and III, *supra*, we submit that the judgment as to all five counts must be reversed.

CONCLUSION.

We have shown that the judgment against appellant must be reversed because the indictment upon which he was brought to trial was defective for failing to allege facts showing the pertinency of the questions asked him or the wilfulness of his refusal to answer them. Nor does the evidence introduced against appellant establish beyond reasonable doubt that the questions were pertinent to the inquiry or that appellant did not in good faith believe his refusal to answer was a privileged one. We have also shown that the record reveals a serious question as to whether, as to four of the questions at least, appellant was clearly apprised that his answer was demanded.

Finally, and going to the heart of the case, we submit that notwithstanding how the Court decides any of the foregoing issues, appellant's refusal to answer was in fact and in law protected by the Fifth Amendment privilege against self-incrimination.

For the foregoing reasons—or any one of them—the judgment below must be reversed with directions to enter a judgment of acquittal.

Dated, San Francisco, California,
October 15, 1956.

Respectfully submitted,
GLADSTEIN, ANDERSEN, LEONARD
& SIBBETT,
NORMAN LEONARD,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

HEARING BEFORE THE COMMITTEE ON UN-AMERICAN ACTIVITIES, HOUSE OF REPRESENTATIVES, Eighty-Third Congress, Second Session, June 18, 1954—Investigation of Communist Activities in the Pacific Northwest Area—Part 9 (Portland); and June 19, 1954, Part 10 (Portland).

EXCERPTS FROM TESTIMONY

(P. 6605):

"(Mr. Velde) . . . The investigation will resolve largely around communistic influences in this area.

Communism is, of course, the clear and present danger to our constitutional liberties. The Communist Party, we know after long periods of study, many long hearings which we have engaged in, is a conspiracy. It is designed to overthrow our form of government by force and violence."

(P. 6610):

"Mr. Kunzig. Mr. Owen, figuring out your age at the present time, you were then about 23 when you joined the Communist Party? That is roughly correct; is it not?

Mr. Owen. Roughly, yes.

Mr. Kunzig. What club of the Communist Party in this area did you join?

Mr. Owen. The John Reed Club.

Mr. Kunzig. Would you tell the committee please something about the John Reed Club; where it met, what it was and as much as you can recall.

Mr. Owen. Basically it was a club composed of college students. Most of those students attended Reed College.

Mr. Kunzig. You mean this particular Communist Party group was actually composed of students of college age here in this area?

Mr. Owen. That's right.

Mr. Kunzig. Where did you meet?

Mr. Owen. We met at different people's homes, including our own. Always, as far as I can recall, in homes and not on campus.

Mr. Kunzig. I see. Now roughly what was the membership of this group?

Mr. Owen. It ranged from oh, approximately 15 at the time I joined to about 5 when I quit or left Oregon in late 1950."

(P. 6614):

"Mr. Kunzig. Now are there any other members of the John Reed Club? You mentioned last Dave Lapham.

Mr. Owen. Mr. and Mrs. John MacKenzie, M-a-c-K-e-n-z-i-e, who joined the party in the fall of 1947."

(Pp. 6622-23):

"Mr. Owen. I attended a functionaries' meeting of those who were officials of various clubs at the home of Dirk DeJonge. D-i-r-k D-e-J-o-n-g-e.

Mr. Kunzig. What are Communist Party functionaries, Mr. Owen?

Mr. Owen. They consist of the chairman, treasurer, secretaries of the individual clubs.

Mr. Kunzig. Of the Communist Party?

Mr. Owen. Yes.

Mr. Kunzig. Are there any others? Can you identify, before I go further, this Mr. DeJonge, his residence, home or anything of that nature?

Mr. Owen. His home is located in southeast Portland or was at that time.

* * *

Mr. Kunzig. Any others?

Mr. Owen. Mrs. Don Wollam. W-o-l-l-a-m. I attended a meeting in her home which she also attended."

(Pp. 6636-38):

"Mr. Velde. Perhaps you might note the citations of the Civil Rights Congress, Mr. Counsel, if you could supply—find them—in a hurry?

Mr. Kunzig. The Civil Rights Congress, Mr. Chairman, and for the record, has been cited as subversive and Communist by Attorney General Tom Clark in 1947, and again in 1948. It has been cited by this committee in 1947 as an organization formed as a merger of two other Communist-front organizations: the International Labor Defense and the National Federation for Constitutional Liberties, dedi-[6637] cated not to the broader issues of civil liberties but specifically to the defense of individual Communists and the Communist Party and controlled by individuals who are either members of the Communist Party or openly loyal to it.

* * *

(Mrs. Hartle). The Civil Rights Congress in Seattle was completely under Communist domination at the time that I left Seattle."

(P. 6643):

"(Mrs. Hartle). Going underground simply meant that you disappeared from the present scene; you took another name, you took another social-security number, you took another age, you changed your identity in such a way that you would not be recognized by anyone, by authorities or others."

(P.p. 6644-45):

"(Mrs. Hartle) . . . But as far as youth in general is concerned, the Communist Party attaches a great deal of importance to work among youth. This is true internationally and it is true of the Communist Party of the U.S.

A. In the Northwest district, as a district board member, I was as-[6645]signed to head the district youth work and it was considered an important assignment to build the Labor Youth League, to penetrate the universities, the campus organizations of the University of Washington and other colleges and to do work in high schools as well.

Mr. Kunzig. I realize that to a great extent that you were largely in the Washington area. We had testimony here this morning, sworn testimony, about a Communist Party cell at Reed College. I wonder if that in any way came to your attention?

Mrs. Hartle. Especially during the 1930's I heard many reports at district plenums, that is enlarged district committee meetings, I heard many reports that spoke of the success and work of the Communist Party at Reed College. By the 1940's, and that was at those times fairly well detailed and fairly well

given in detail; however, by the time of the 1940's while Oregon was still in the district, the reports would be more general, but it was well understood by the district leadership and spoken of in private conferences that from time to time there was varying success at Reed College. I have always known that the Communist Party in Oregon had some kind of contact through students and sometimes through teachers at Reed College."

(P. 6649):

"Mr. Kunsig. You said that the concentration policy of the Oregon section was directed toward lumber. Is there any other concentration of any other kind in any other direction in addition to that?

Mrs. Hartle. One of the other concentrations in Oregon, and especially the Portland area, was the concentration of the maritime industry and unions. That was another important Oregon concentration."

(P. 6654):

"Mr. Kunzig. Isn't it a fact, Mr. MacKenzie, that Communist Party meetings were held in your home?

Mr. MacKenzie. Mr. Chairman, I refuse to answer that question on the grounds of the fifth amendment."

(Pp. 6675-76):

"Mr. Canon. Yes; I was the cochairman of the Civil Rights Congress when it was organized. I don't recall the year. I would judge 1947. I would think that it was 1947. Don Wollam and I——

Mr. Kunzig. Would you spell that name, please?

Mr. Canon. I believe it is W-o-l-l-a-m. I can't tell you. I don't know.

Mr. Kunzig. W-o-l-l-a-m, Don Wollam; yes——

* * *

(Mr. Canon). Don Wollam and I did cochair it. We went about as far as to have letterheads, stationery printed, a number of national officers. Actually we did practically no work. There was no issue before us."

(P. 6677):

"Mr. Kunzig. Mr. Chairman, I think the record should show that, at this point, that the Civil Rights Congress was declared subversive and Communist by Attorney General Tom Clark on December 4, 1947. That was released at that time all over the country."

(P. 6679):

"Mr. Kunzig. Now did you join any particular club of the Communist Party?

Mr. Canon. Yes, I joined what was known as the professional club.

Mr. Kunzig. The professional club of the Communist Party?

Mr. Canon. That's right.

Mr. Kunzig. What did that mean, the professional club?

Mr. Canon. Well, there were many clubs. Each had a name. Ours was no more exclusively professional than several others. Our particular club was made up primarily of people whose interests and livelihood were centered around Reed College. It was a very small club, and the party went through several

reorganizations at that time, organizing clubs on the basis of neighborhood and then organizing clubs on the basis of common industry, and so forth, but ours remained stable throughout the period as a group of people who normally associated in Reed College."

(P. 6680):

"Mr. Kunzig. Where did you meet?

Mr. Canon. In one of our homes. We would rotate in our homes . . ."

(Pp. 6684-85):

"Mr. Canon. The only other significant role that my wife and I took, we were for a short period of time, I don't remember the dates or the time, but what might be called a mail drop for the downstate party people. I think it was at the time that the party was becoming a little apprehensive about its mail being tampered with and the club dues were sent to us, addressed to us personally, and came to our house, and we then in turn, turned the dues over to Mrs. Simpson, who would come from the party office to pick them up.

Mr. Kunzig. Give us a little further information. We have heard that term before, but there might be many who don't understand what the term 'mail drop' means. Tell us a little more about a mail drop.

Mr. Canon. I don't know that I can tell you much more about it. We were simply asked if we would mind using our address as a receiving address for Communist dues around State, and we said, 'All right,' [6685] and so the dues from the various parties, from the various clubs, were sent to us, and we

didn't open the mail. We simply collected it and passed it on to a courier from the central office."

(P. 6697):

"Mr. Canon. To tell you the truth, I had forgotten. I didn't mention to Mr. Kunzig this mail-drop business. It completely slipped my mind until that Captain Brown mentioned it to me this morning."

(P. 6719):

"Mr. Kunzig. Now we will go right on and let me ask you if it isn't true, and I repeat what you said a little earlier that we don't consider this to be funny at all, isn't it true that you are today—this very minute as you are sitting here in this courtroom of the United States courthouse before the Congress of the United States of America—a section organizer of District 11 Committee of the State of Oregon Communist Party right now in 1954? Isn't that correct?

Mr. Wollam. I refuse to answer that question on all the grounds I just gave Mr. Chairman."

(P. 6723):

"(Mr. Velde). And then to the Portland city police, particularly Capt. Bill Brown and Detective Bob Beaubelle. They have helped us materially in investigative work and they have assisted our staff in all ways possible . . ."

No. 14,744

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DONALD M. WOLLAM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District Court for the District of Oregon.

BRIEF FOR THE APPELLEE

FILE

NOV 19

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Appellee.

On Appeal from the Judgment of the United States District Court for the District of Oregon.

BRIEF FOR THE APPELLEE

OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

Appellee adopts the jurisdictional references of appellant's brief.

QUESTIONS PRESENTED

1. May the appellant supplement the record by evidence not before the trial court?

2. May the Court of Appeals take judicial notice of evidentiary documents not of record nor directed to the trial court's attention?

3. Did the Court below properly deny appellant's motion to dismiss the indictment on appellant's claim that the indictment failed to allege facts showing pertinency of questions asked appellant?

4. Did the Court below properly deny appellant's motions for judgment of acquittal and new trial on the contention that the evidence failed to establish beyond a reasonable doubt that the questions asked appellant were pertinent?

5. Did the Court below properly deny appellant's motion to dismiss the indictment on the contention that the indictment failed to allege facts showing that appellant's refusal to answer the question was wilful?

6. Did the Court below properly deny appellant's motions for judgment of acquittal and new trial on the contention that the evidence failed to show beyond a reasonable doubt that the appellant's refusal to answer the questions was wilful?

7. Did the Court below properly hold that the appellant was not entitled to invoke privilege against self-incrimination in refusing to answer the questions?

8. Did the Court properly hold that the appellant had been sufficiently directed to answer the first four questions after claim of privilege against self-incrimination?

STATUTE INVOLVED

2 USC 192. Appellee adopts statute as printed in page 2 of Appellant's Brief.

COUNTER STATEMENT OF THE CASE

1. Appellant Has Asserted Evidence Not in the Record.

In the statement of the case and throughout his argument appellant has relied upon evidence dehors the record. Appellant has constantly referred to portions of the testimony of other witnesses before the Committee. Not any of the testimony of these witnesses before the Committee was presented to the trial court.

In addition, appellant has further relied upon material outside the record by referring to newspaper articles which were merely submitted to the court as part of an offer of proof, which offer was denied. The denial of the offer of proof has not been assigned as error (R. 87).

2. Appellee's Counter Statement of Case.

Appellant was convicted by jury trial of refusing to answer questions pertinent to questions under inquiry by a Subcommittee of the Un-American Activities Committee of the House of Representatives, United States Congress, on all counts of a five-count indictment.

Appellant, *inter alia,* at the trial below, asserted through counsel that his refusals had been privileged and the questions not pertinent to the subject under inquiry. Appellant further challenged the sufficiency of the indictment, and after verdict moved for new trial,

alleging insufficiency of the indictment and evidence. The Court sustained the indictment and denied the motion for new trial, and held the questions pertinent and the refusals of the defendant to answer not privileged. The jury was instructed that they must find, in order to convict, that the defendant wilfully refused to answer the questions.

Appellant, during his testimony before the Subcommittee, was directed to answer each of said questions.

The questions which the appellant refused to answer were the preliminary identifying questions immediately following his oath, and inquired of his present address, present employment, and educational background. On their face, they were innocuous questions. At the trial below, at the time of arraignment, appellant through his counsel (R. 18) indicated a desire to purge himself of the contempt citation, was allowed time to support such position, but did not attempt a showing thereon.

A motion to dismiss, raising many of the points relied upon by appellant in this appeal, was denied. A motion for the issuance of a *subpoena duces tecum* and for inspection of documents in possession of the Subcommittee's investigator was filed by appellant (R. 8-9) and denied by the court for the reason, *inter alia,* that the documents sought were not evidentiary or relevant to any issue in the case. *U. S. v. Carter,* DC DC 1954, 15 FRD 367; *Bowman Dairy Co. v. U. S.,* 341 U.S. 214, 1951; *Morford v. U. S.,* DC Cir. 1949, 176 F. 2d 54. The denial of the motion for *subpoena duces tecum* has not been specified as error on this appeal.

SUMMARY OF ARGUMENT

The appellant cannot supplement the record with evidence which had not been presented to the trial court. *Maffie v. U. S.*, 1 Cir. 1954, 209 F. 2d 225. An appellate court will not take judicial notice of evidentiary matters not called to the attention of the trial court in a criminal case. *Rumely v. U. S.*, DC Cir. 1952, 197 F. 2d 166, aff. 345 U.S. 41.

The indictment was sufficient. The allegation of pertinence was sufficient. *Sinclair v. U. S.*, 279 U.S. 263, 1929. The proof was sufficient to establish pertinency. The questions were identifying and concerned subject matter properly under inquiry (R. 50-60). The indictment alleged that the appellant refused to answer those pertinent questions. The word "refused" embodies intent amounting to deliberate, not inadvertent, failure. Preceding the word "refused" with the word "wilfully" would contribute nothing toward a complete statement of the charge, nor more fully advise the appellant of what he must defend. See *Chapman v. U. S.*, 8 App. DC, 302 at 316, 319, 1895; *Sinclair v. U. S., supra,* at 299; *Fields v. U. S.*, DC Cir. 1947, 164 F. 2d 97, cert. den. 332 U.S. 851, 1948; *In re Chapman,* 166 U.S. 661, 1897; *U. S. v. Deutch,* DC Cir. 1956, 235 F. 2d 853; *Elwert v. U. S.*, 9 Cir. 1956, 231 F. 2d 928.

The proof supports the jury verdict that the appellant acted wilfully, deliberately and intentionally and not inadvertently. See R. 53 and Govt's Ex. 4, p. 4, wherein the appellant said:

> ". . . since I have no intention of becoming a member of your stable of stool pigeons I am going

to stand upon my constitutional rights and decline to answer the question upon the grounds . . ."

If he was not privileged, as the Court found, he was obliged to answer the questions.

There was nothing in the setting as submitted to the trial court, to entitle the appellant to invoke the privilege against self-incrimination. The witness did not, through any admitted evidence of record, show the Court anything in the setting to support his claim of privilege.

Appellant was under clear directions to answer the questions. He could have had no doubt that the Committee was rejecting his claims of privilege, in every instance, as to the questions involved in the indictment.

ARGUMENT

I. Upon an Appeal in a Criminal Case, the Appellate Court Will Not Consider Additional Evidence Which Had Not Been Presented to the Trial Court.

Appellant's brief and the Appendix attached thereto include portions of the testimony before the Committee which were neither offered nor received in evidence at the trial and are not part of this record on appeal. In this manner appellant has attempted to supplement the record with respect to the "setting" at the time appellant appeared before the Committee. No attempt whatever was made by appellant to have any portion of the testimony of the other witnesses before the Committee placed in evidence at the time of trial.

A criminal case is not tried *de novo* upon appeal, but upon the record. The appellate court will not consider matters of evidence dehors the record but merely brought to the Court's attention in appellant's brief. *Maffie v. U. S.*, 1 Cir. 1954, 209 F. 2d 225.

In the *Maffie* case, *supra,* appellant desired to supplement and augment the record by having included additional evidence with respect to the "setting", in the form of newspaper stories. In declining to receive the newspaper articles, the court emphasized that it would certainly be a procedural innovation to require an appellant court, upon review of a judgment in a criminal case, to receive and consider additional evidence which had never been presented to the court rendering the judgment under review.

The evidence with which appellant desires to supplement the present record cannot, in any manner, be considered newly-discovered evidence. The testimony and proceedings before the Committee had been printed and published prior to the trial and were available to appellant as a matter of public record. *Brandon v. U. S.*, 9 Cir. 1951, 190 F. 2d 175; *Wagner v. U. S.*, 9 Cir. 1941, 118 F. 2d 801.

By means of supplementing the record, appellant also appears to be attempting to change somewhat the theory of defense, by urging matters which were neither offered nor claimed at the time of trial. If, at the time of trial, appellant, in claiming the privilege against self-incrimination, was actually relying upon the testimony of the other witnesses before the Committee to show the

"setting", it was incumbent upon appellant to bring such testimony before the trial court ruling upon the issue of privilege.

II. On Review of Judgment in a Criminal Case, the Appellate Court Will Not Take Judicial Notice of Evidentiary Matters Not Called to the Attention of the Trial Court.

In the footnote at Page 3 of appellant's brief, it is contended that the present record can be supplemented on the thory that this court may take judicial notice of the entire official records of a Congressional Committee, relying upon *Greeson v. Imperial Irrigation Dist.,* 9 Cir. 1932, 59 F. 2d 529; *Red Canyon Sheep Co. v. Ickes,* DC Cir. 1938, 98 F. 2d 308; *Fletcher v. Jones,* DC Cir. 1939, 105 F. 2d 58.

The cases relied upon by appellant do not support his position. Appeals were taken in each of these cases following the granting of motions to dismiss complaints seeking injunctions. The appellate court simply followed the well-established principle that upon a motion to dismiss, the court will deem as admitted, the allegations of the complaint and may further consider pertinent facts within its judicial knowledge. The cases were before the court on questions of law based entirely on the pleadings, as no record whatever was made in the trial court with respect to evidence. In at least two of the cases relied upon by appellant, the trial court had been requested and did take judicial notice of the same factual matters noticed by the appellate court.

When a party desires a trial court to take judicial knowledge of certain matters which are not so self-

evident as to be within the actual knowledge of the court, the party is required to bring such matters to the attention of the court. 9 Wigmore on Evidence, Sec. 2568. The trial court could hardly be expected to have personal knowledge of all the testimony and proceedings before the Committee. At no time did appellant present appropriate transcripts of this testimony to the court and request that judicial notice thereof be taken. Without such request for judicial notice, the appellant was not relieved of the duty of producing evidence as to these facts.

It is further submitted that the present case did not present a situation for the use of judicial notice. Accurately speaking, judicial notice is limited to the acceptance by the court of a fact as proven without requiring evidence from the party. 9 Wigmore on Evidence, Sec. 2566(4). The judicial notice theory is presently being loosely used by appellant to describe the rule of evidence which would allow appropriate copies of these Congressional proceedings to be admitted in evidence. 28 USC Sec. 1736.

In *Rumely v. U. S.*, DC Cir. 1952, 197 F. 2d 166, aff. 345 U.S. 41, the Court of Appeals, when reviewing a conviction for refusal to answer questions propounded to the appellant by the House Committee on lobbying activities, refused to consider portions of the testimony adduced before the Committee, which had not been offered or admitted in evidence at the trial. When the prosecutor wanted a portion of the hearings in evidence, specific parts of the transcript of the hearings were of-

fered in evidence and were received without apparent objection. On appeal, the government apparently sought to have the appellate court take judicial notice of other portions of the testimony before the Committee which had not been received in evidence. With respect to the contention that the appellate court could take judicial notice of these, the court emphasized:

> "Certainly, in a criminal case, we cannot take judicial notice of things the defendant is alleged to have said or done, not shown or offered to be shown in evidence; in fact, no request for such notice was made either in the trial court or before us."

In *Christoffell v. U. S.*, DC Cir. 1952, 200 F. 2d 734, portions of the proceedings before the Congressional Committee were included in the record, not by means of judicial notice but by appropriate documentary evidence. In fact, the trial court declined to admit a portion of the hearings before the Committee, as they were not material to the issue.

The appellant submitted the issue of privilege to the court below on the record as it stood at that time. Upon review of the judgment below, this court should not consider additional evidence neither presented nor called to the attention of the lower court.

III. The Indictment Properly Charged, and the Proof Established the Pertinency of the Questions Asked Appellant.

A. *The Indictment Properly Charged Pertinency of the Questions Asked Appellant.*

The appellee concedes that the questions must be pertinent, but submits that the indictment properly

pleads that they were. The same allegation appears in the case of *U. S. v. Lamont,* DC S.D. N.Y. 1955, 18 FRD 27, as to pertinency, and the Court therein, although finding the indictment defective on other grounds, in that case found no objection to such allegation of pertinency after exhaustive discussions of the requirements of pleading and proof of pertinency. The appellate court, affirming, found that the indictment references were to acts of Congress establishing a Committee to inquire into matters which involved no powers of inquiry enumerated which would make the questions charged in that indictment pertinent. *U. S. v. Lamont,* 2d Cir. 1956, 236 F. 2d 312.

The indictment considered as a whole, without more, would show pertinence of the questions. They were specifically alleged to be pertinent to the question then under inquiry. The position of appellant would seem to be that a committee of Congress, in taking testimony from a witness duly subpoenaed, would be obliged to plunge directly into questions on the subject-matter of inquiry without right to know from the witness anything of his identity, background, or qualifications for testimony about the information sought. Appellant's position further ignores the pertinency of Congress' knowing what the background of persons is who possess or do not possess information concerning the subject under inquiry, or who are willing or unwilling to provide the Congress with the benefit of their knowledge. The questions herein involved are so pertinent on their face that further description in the indictment would add nothing to advising the appellant of the facts against which he

must defend or preventing surprise. The allegations would not permit subsequent charge on the same facts. By reference to the enactments of the Congress cited in the indictment, the charges thereof and the questions themselves, the appellant could have no doubt that the questions were alleged to be pertinent, and by his serious contention that they were not pertinent, shows he was not misled. The elements of the offense were all pleaded. See *U. S. v. Josephson,* 2 Cir. 1948, 165 F. 2d 82, cert. den. 333 U.S. 838, 1948; *Sinclair v. U. S., supra,* at 298-299; *Elwert v. U. S., supra.* In such circumstances, utilizing the language of the statute as was here done seems appropriate. We submit that the questions herein were of such nature that their not being pertinent in any inquiry appears improbable.

B. *The Proof Supported the Court's Finding of Pertinency.*

The inability to inquire into the identity and background of a witness would in effect preclude inquiry of the witness at all. A witness declining to answer such questions frustrates the lawful objects of the Committee so that other more probative questions become meaningless, yet for his recalcitrance, the appellant would have the Committee powerless to act in support of its lawful powers. Questions as to address, employment and educational background are not unlawful intrusion into private affairs. *In re Chapman, supra; U. S. v. Josephson, supra; Lawson v. U. S.,* DC Cir. 1949, 176 F. 2d 49, cert. den. 339 U.S. 934, 1950; *Morford v. U. S.,* DC Cir. 1949, 176 F. 2d 54; *U. S. v. Orman,* 3 Cir. 1953, 207 F.

2d 148. As the Court said in *Barsky v. U. S.*, DC Cir. 1947, 167 F. 2d 241, cert. den. 334 U.S. 843, 1948, at p. 246:

> "If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the party. . . . Personnel is part of the subject. Moreover, the accuracy of the information obtained depends in large part upon the knowledge and the attitude of the witness, whether present before the Committee or represented by the testimony of another. . . ."

And, at p. 249:

> "We proceed upon the theory that even the most timid and sensitive cannot be unconstitutionally restrained in the freedom of his thought. But this consideration does not solve the problem, because the problem is the relative necessity of the public interest as against the private rights. Even assuming private rights of the timid to be of the fullest weight, the problem remains whether they outweigh the public necessities in this matter. That the protection of private rights upon occasion involves an invasion of those rights is in theory a paradox, but, in the world as it happens to be, is a realistic problem requiring a practical answer. That invasion should never occur except upon necessity, but unless democratic government (by which we mean government p r e m i s e d upon individual human rights) can protect itself by means commensurate with danger, it is doomed. That it cannot do so is the hope of its opponents, the query of its skeptics, the fear of its supporters. . . ."

Appellee submits that the trial court was correct in its view that there was ample proof of facts to support the Court's finding on the question of law that the questions were pertinent. Testimony and the record support

the proof of pertinency. The arguments as to the indictment appear applicable here—proof of the questions and question under inquiry supports finding them pertinent in fact.

In addition, the testimony explains their pertinence (R. 46, 50-60).

The objection that the Committee already knew the answer to the questions would, if true, be no defense. *Young v. U. S.*, DC Cir. 1954, 212 F. 2d 236 at 239, cert. den. 347 U.S. 1015, 1954.

IV. The Indictment and Proof Was Sufficient with Regard to the Element of "Wilfulness."

A. *It Is Not Necessary to Specifically Allege Wilfulness in the Charge.*

In *U. S. v. Deutch, supra,* the Court was specifically concerned with an indictment challenged for failure to allege "wilful" refusal. The holding of the Court is succinct and clear:

> "The statute uses the word 'willfully' as a word of art to define the offense of failing to appear, but it does not use the word 'willfully' with respect to a person 'who, having appeared, refuses to answer * * *.' The act of refusing (as distinguished from failing) to answer is a positive, affirmative act; the result is conscious and intended. Congress recognized that a failure to appear in response to a summons could well be due to other causes than willfulness or a deliberate purpose to disobey the summons or the statute; a witness might be confused as to the time or place of the hearing, or inadvertently overlook it or become ill. To decline or refuse to answer a question, however, is by its very nature a deliberate and willful act."

The *Deutch* case, *supra,* which reversed the trial court's dismissal of the indictment, also appropriately distinguishes the case of *Quinn v. U. S.,* 349 U.S. 155, 1955, which was concerned not with the indictment but with proof of deliberate, intentional refusal to answer. Attention is invited to the following topic of this brief discussing proof of wilfulness, and in particular to *Sinclair v. U. S., supra,* which, as the *Deutch* case, pointed out that wilfulness was not part of the charge in the second portion of 2 USC 192. See, also, *Fields v. U. S., supra,* and *Dennis v. U. S.,* DC Cir. 1948, 171 F. 2d 986, aff. 339 U.S. 162, 1950, which reason that wilful does not mean bad purpose or intent to break the law, but only doing an act knowingly and deliberately. If refusal is by nature a deliberate and wilful act, the indictment would not be changed in meaning by the addition of the word "wilfully." See, also, *U. S. v. Josephson, supra.*

B. *The Proof Established that the Appellant's Refusals Were Deliberate, Intentional and Wilful.*

The question of wilful refusal was submitted to the jury under proper instructions. The jury resolved this fact question against the appellant. There is evidence to support its verdict. The verdict should not be disturbed.

The appellant advised the Committee that he had "no intention of becoming a member of your stable of stool pigeons."

The appellant was specifically directed to answer the questions, and could have been under no illusion that the questions for which he was indicted were aban-

doned, nor his claim of privilege accepted as to them. The defense submitted no evidence to the jury to counter this proof.

Good faith and advice of counsel are not defenses to wilful refusal to answer the questions in any event. *U. S. v. Costello,* 2 Cir. 1952, 198 F. 2d 200, cert. den. 344 U.S. 874, rehearing den., 344 U.S. 900, 1952. Therein the court held that the trial court properly instructed the jury:

> "A belief on the part of the defendant that he lawfully could act as he did or the fact that he might have been advised by his attorney that he lawfully could act as he did, is no justification for his acts and may not be considered by you in determining whether the defendant acted in good faith."

See also *Eisler v. U. S.,* DC Cir. 1948, 170 F. 2d 273, cert. den. 338 U.S. 883, 1949, in which the court held that good faith and mistake of law are not a defense, and that the offense may be made out if the refusal to answer is deliberate and intentional.

The appellant's reliance on *U. S. v. Murdock,* 290 U.S. 389, 1933, is surprising considering the analysis in that case of *Sinclair v. U. S., supra,* and in its analysis said:

> "The applicable statute did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer . . ."

Appellee submits that the record refutes good faith of appellant if such were a basis for defense, but, instead, shows hostility toward the Committee translated into conduct consciously intended to frustrate it.

That the privilege against self-incrimination, as stated in *Hoffman v. U. S.*, 341 U.S. 479, 1951, must be accorded liberal construction in favor of the right it was intended to secure, provides no basis for contending that a good faith assertion of the privilege is a defense, if in fact the privilege was not properly claimed.

While the government was in a criminal case bound to prove the charges beyond a reasonable doubt, the burden of going forward with the evidence may shift. See *U. S. v. Fleischman,* 339 U.S. 349, 360, 1950.

We invite the court's attention to further discussion of wilfulness under the section of appellee's brief regarding direction to answer.

V. The Trial Court Properly Ruled That the Appellant Was Not Entitled to Invoke the Privilege Against Self-Incrimination.

A. *The "Setting" and Circumstances Did Not on the Record Support a Reasonable Fear of Self-Incrimination.*

It is urged that because some law enforcement officers were in attendance, the setting was one to justify fear of incrimination. The presence of law enforcement officers to assist in the keeping of order at a public hearing hardly amounts to a star chamber. The trial court had no record of testimony of others placed before it upon which to support the position that to answer the questions might be injurious. The appellant approached the question of the testimony of one Cannon and one Owen (R. 69), but did not ask the witness under cross-examination to repeat the testimony of these witnesses, show whether it was elicited in the presence of the ap-

pellant, or had come to appellant's knowledge. It is submitted that the appellant chose to conceal from the trial court a portion of the defense he now claims, and, having lost, seeks now to avail himself of the matter in the appellate court having none of the machinery of the jury, witnesses or other facilities which peculiarly equip the trial court to resolve the facts. The appellant was entitled to a fair trial, but only one. It was his responsibility to place his full known defense before the trial court.

Appellant, in his brief, asserts that he had good faith reasons to believe there was evidence tending to show Communist efforts to "infiltrate" educational institutions, trade unions, the maritime industry, and, in addition, makes numerous assertions outside the trial record. Appellant in no way connects himself on the record with any incriminating circumstances derived from Communist efforts to infiltrate educational institutions, trade unions, the maritime industry, and did not show any basis of fear of incrimination therefrom peculiar to himself, particularly as to the questions the subject of this conviction.

B. *Answers to the Questions Asked Could Not on the Record Have Incriminated Appellant.*

1. It is newly asserted on appeal that by stating his address, appellant might have identified his home as a place of Communist activity. Appellee submits that the trial court was entitled to have this assertion made before it and to evaluate the reasonableness of the claim. In *Starkovich v. U. S.*, 9 Cir. 1956, 231 F. 2d 411, the

trial record included indication that two persons of that name were known, and one who had been stated to live at certain places had been alleged by a previous witness to have been a Communist. Identity by address thus could, on the record before the trial court, be said to be a link in the chain of incriminating evidence in that case.

2. The question as to employment, considered on the record, the appellee submits, if properly placed before the trial court, would have been potentially vulnerable in view of the ambiguous circumstance occasioned by the leading questions of the Committee concerning activities as a Communist organizer and espionage, which could, by strained construction, be employment. However, the record (R. 67) clearly showed that the "present employment" concerned was that of a longshoreman and that the defense contention and theory of defense was that the Committee had the knowledge from other sources and was not entitled, therefore, for some obscure reason, to seek it from the witness. On this state of the record, the Court had a right to rule that the claim of privilege was improper and the jury to find the refusal to answer wilful. It is to be noted that the case of *Jackins v. U. S.*, 9 Cir. 1956, 231 F. 2d 405, involved a question covering the entire employment history of Jackins from 1935 to 1954 in a setting which the record showed gave Jackins reason to believe that he had been identified as a "youth leader" and "full time functionary" within the Communist Party, a clearly distinguishable setting.

3. On the record, no showing was made to support the claim of privilege as to the educational background questions about attendance at elementary school, high school or college. The questions were on their face and on the record innocuous. They were not "skillfully drawn questions designed to entrap." That Communist infiltration involves young people referred to in the Attorney General's list of subversives, is alone no reasonable support for the claim of privilege.

To accord the case of *Trock v. U. S.*, 351 U.S. 976, 1956, the meaning urged for it by appellant would do just that which the case of *Hoffman v. U. S., supra,* at p. 486, upon which the Supreme Court in the *Trock* case relies, forbids. In the *Hoffman* case the court said:

> "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified."

We submit that here the Supreme Court, on the record in the *Trock* case, only considered that the entire setting in the Grand Jury and the chain of questions asked taken together justified the claim of privilege—not that no showing was required. To hold otherwise would call for a modification of the *Hoffman* case, the citation of which was deemed a substitute for explanation of the reversal.

Reverence for the Fifth Amendment privilege against self-incrimination does not require tolerance of its abuse.

When questions do not on their face appear to call for an answer which would tend to incriminate, it is in-

cumbent upon the witness to justify his refusal to answer on the ground claimed, by making it appear that his assertion that the answer would tend to incriminate was based upon substantial reasons so to believe, and it is not enough that answers to anticipated later questions might incriminate. *Camarota v. U. S.*, 3 Cir. 1940, 111 F. 2d 243, 245; *U. S. v. Fleischman, supra.*

VI. Appellant Was Properly Directed to Answer the Questions Referred to in Each Count of the Indictment.

The Committee did lay the necessary foundation for a finding of criminal intent to violate Section 192 for a refusal to answer, as required by the Supreme Court in *Quinn v. U. S.*, 349 U.S. 155, 1955; *Emspak v. U. S.*, 349 U.S. 190, 1955, and *Bart v. U. S.* 349 U.S. 219, 1955. The appellant was apprised that the Committee demanded his answers notwithstanding his expressed reasons for refusing to answer. A clear-cut choice was afforded appellant between answering the questions and risking prosecution for failure to do so.

In accordance with the long-standing practice of Congressional Committees, approved by the Supreme Court in the *Quinn* case, *supra,* the Committee notified appellant of the overruling of his objections by specifically directing him to answer each question. As we will presently detail, the directions to answer were given *after* the claim of privilege was asserted with respect to each question.

In none of the three cases decided by the Supreme Court was the witness specifically directed to answer the question. Nor in *Jackins v. U. S.*, 9 Cir. 1956, 231

F. 2d 405, was there any specific direction to answer given with respect to the three questions upon which acquittal was directed on this ground.

In *Fagerhaugh v. U. S.*, 9 Cir. 1956, 232 F. 2d 803, the only specific direction to answer followed the witness' statement that he refused to answer for reasons other than the claim of privilege against self-incrimination. Thereafter, the witness, for the first time, raised his objection on the grounds of the Fifth Amendment. Following this claim of privilege, the Committee failed to direct the witness to answer, but, on the contrary, abandoned the question by the language: "There is no question before the witness." Unlike the *Fagerhaugh* case, the directions to answer in the present case were given after the claim of privilege and at no time did the Committee abandon the question.

1. The entire testimony of appellant before the Committee is set forth in Government's Exhibit No. 4. As to the first question, the appellant stated a number of grounds for refusing to answer (Govt's Exh. 4). Among these, appellant specifically stated:

> "I refuse to answer that question on the grounds of the FIFTH AMENDMENT, the decision of the United States judge, James Alger Fee, in the case of the United States versus . . ." (Govt's Exh. 4) (Emphasis supplied).

Thereafter, the appellant was not only specifically directed to answer the question but was also warned of a possible contempt on his part (R. 33). Following the direction to answer, the appellant simply reiterated the same grounds for his objection which had already been

overruled by the Committee. The appellant had been clearly apprised of the Committee's view upon his objection by the direction to answer.

This situation is, therefore, distinguished from *Fagerhaugh v. U. S., supra,* in which case the direction to answer came *before* the claim of privilege against self-incrimination. In the present case, the direction to answer came *after* the same claim of privilege.

2. With respect to the second question, the appellant stated his objection as follows:

> "Mr. Kunzig, I refuse to answer it not just on the fifth amendment, as you stated that you would understand my refusals would be based upon, *but upon all of the grounds that I have previously stated.*" (Govt's Exh. 4) (Emphasis supplied).

Thereafter, the Chairman directed appellant to answer the question (R. 54). By the direction to answer, the appellant was clearly apprised that the Committee had overruled his grounds for refusal to answer, not only on the basis of the Fifth Amendment, but also upon the grounds he had previously stated, which included the First, Fifth, Ninth and Fourteenth Amendments to the U. S. Constitution and the similar provisions of the Constitution of the State of Oregon. The appellant thereafter simply repeated the reasons for his refusal to answer, all of which had been clearly ruled upon by the Committee. By going on to the next question, after having directed appellant to answer, the Committee certainly did not abandon this question, but merely put an end to appellant's repetitious statement of his ground for refusal.

3. Following the appellant's refusal to answer the third question, appellant commenced a repetition of the reasons he had previously stated for his refusal to answer, whereupon the Committee Chairman directed appellant to answer the question. The appellant's deliberate, intentional refusal to answer the question is further shown by his statement that he had "no intention of becoming a member of your stable of stool pigeons." The Committee did not abandon this question, but, on the contrary, directed appellant to answer the question, and moved along to the next question when appellant persisted in his refusal.

Appellant contends that the direction to answer was given to a question different from the one originally put to him. It is submitted that the direction to answer need not be *in haec verba*. The record amply supports that the appellant was directed to answer the same question originally asked.

4. In response to the fourth question, appellant refused to answer, stating that he was standing on the Constitution of the United States and "the same provisions that I cited earlier." Thereafter, appellant was specifically directed to answer the question.

5. Appellant concedes that the Committee clearly indicated its overruling of his reason to answer the fifth question by specifically directing the appellant to answer.

The record of this case clearly demonstrates that as to each of the five questions comprising the five counts of the indictment, the Committee unequivocally indi-

cated to the appellant that it had overruled his objections to the question by specifically directing the appellant to answer each question. By directing the appellant to answer, the appellant was adequately apprised that an answer was required notwithstanding his reasons for refusal.

Since appellant concedes that the fifth count must be upheld in this regard, it is respectfully submitted that the sustaining of appellant's conviction on any one count of the indictment requires affirmance of the judgment below, because the general sentence imposed on all counts was less than the maximum allowable on any single count. *Sinclair v. U. S.,* 279 U.S. 263, 299, 1929; *Lowden v. U. S.,* 9 Cir. 1951, 187 F. 2d 484.

In the *Quinn* case, *supra,* the Supreme Court pointed out that no fixed verbal formula was necessary to indicate to the witness the Committee's disposition of the reasons given by the witness for his refusal to answer. In the instant case, we observe, however, that the Committee followed the procedure suggested by the Supreme Court, by specifically directing the appellant to answer each question. In this way, the appellant was not forced to guess as to the Committee's ruling upon his grounds of objection. There is not any evidence whatever in the record to the effect that appellant was under any misapprehension as to the disposition by the Committee of appellant's objections. At the trial, appellant did not raise this point in any manner, introduce any evidence or make any claim whatever that he was, in fact, under any misapprehension as to the disposition of his objec-

tions by the Committee. In fact, the question of wilfulness and intent was submitted to the jury under proper instructions and resolved against appellant.

To adopt the position of the appellant would allow a recalcitrant witness to defeat a direction to answer by merely constantly repeating his grounds of objection after they have been overruled.

CONCLUSION

This case should be decided on the trial record. The trial court should be affirmed on his rulings in the absence of error. The jury's findings of fact in a criminal case, where there is evidence to support the finding, should not be disturbed. The trial court's rulings as to privilege and pertinence are supported on the record and the transcript as a whole demonstrates that the appellant was hostile and recalcitrant and by sham claims, frustrated the Subcommittee in its questioning of him as a witness. His theories of claim of privilege are afterthought, his technical objections to the indictment are groundless and his deliberate refusal to answer the questions justified the conviction. Appellant contends that as to 4 of the 5 counts on which he was convicted, he was not, within the rulings of the *Quinn, Bart* and *Emspak* cases, *supra,* sufficiently directed to answer and informed that his claims of privilege were denied. The reading of the transcript would leave no other impression than that the appellant was fully aware of the Committee's direction to answer and denial of privilege. Adoption of the appellant's theory on these facts could

lead only to a race of diligence between Committee and witness to speak the last words.

It is respectfully submitted that the appellant seriously abused the precious constitutional privileges he asserted. The verdict and judgment should be affirmed.

Respectfully submitted,

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November, 1956

No. 14,744

United States Court of Appeals

For the Ninth Circuit

DONALD M. WOLLAM,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S REPLY BRIEF.

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No. 14,744

United States Court of Appeals
For the Ninth Circuit

DONALD M. WOLLAM,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S REPLY BRIEF.

In this brief we will not reargue the case in full but will seek only to answer such portions of the government's brief as we believe require answer. For the rest, we will rely upon what we said in our opening brief.

I.

THE SETTING IN WHICH THE QUESTIONS WERE ASKED CLEARLY SHOWS THAT THEY WERE INCRIMINATING.

A. This Court has a right and a duty to consider the complete record of the Subcommittee in order to evaluate the setting.

The government's chief complaint seems to be that appellant has referred this Court to the entire record

before the Subcommittee, and that he has not, as the government would wish, limited his presentation here to only a portion of that record.

Appellant submits that while the complete record of the Subcommittee's proceedings might well have been introduced below, there is no reason why this Court should deny itself any information which will enable it to determine this appeal upon the basis of justice and equity. This Court clearly may take judicial notice of the proceedings of a Congressional Committee (*United States v. Darby,* 312 U.S. 100, 109; *Overfield v. Pennroad Corp.,* 146 F.2d 889, 898 [3 Cir.]), and it is particularly appropriate that it do so in a case involving an alleged contempt of a Congressional Subcommittee. The government wishes the Court to examine part of the Committee's records to see if a contempt was committed; the appellant submits that an examination of the entire record shows that one was not.

Further, in cases involving a claim of the privilege against self-incrimination, the Courts have not taken any narrow or restricted view of what they might or might not consider in assessing the validity of the claim. As Mr. Chief Justice Taft remarked many years ago, a judge in such a case "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence" (*Ex parte Irvine,* 74 F. 954, 960 [C.C. Ohio]). This language is quoted with approval in *Hoffman v. United States,* 341 U.S. 479, 487, where it was specifically held that a "supplemental record" filed after the trial was

over, "should have been considered by the Court of Appeals" because

> "The ends of justice require a discharge of one having such a right *whenever* facts appear to sustain the claim of the privilege" (346 U.S. at 489; italics added).

In *Maffie v. United States,* 209 F. 2d 225 (1 Cir.), relied upon by the government, what was sought to be introduced for the first time on appeal were a series of newspaper articles; here we ask the Court to consider only the official printed records of the Congressional Committee.[1] To ask this Court to ignore the record before the Subcommittee—to ask it to disregard the entire setting in which the questions were asked—is to ask it to be a "blind" Court which does not see that which "all others can see and understand." Cf. *United States v. Rumely,* 345 U.S. 41, 44. Two decades of experience with committees such as the one here involved have taught the Courts, as well as the public, that the purpose of their investigations and the validity of the claims of those who refuse to testify before them, can be ascertained only by a full examination of their records.

[1]Furthermore, the *Maffie* observations are obviously dicta since the conviction of contempt there was *reversed* (even without regard to the supplemental material) on the ground that although the questions were apparently innocuous, nonetheless the "background" of the investigation (209 F.2d at 230) was enough to show that somehow appellant was "implicated" in the criminal transaction (209 F.2d at 232). Here, of course, the same situation is clearly presented; see *infra,* subpoints B, C, and D. So, too, is the *Rumely* observation (Brief for Appellee, p. 10) *dicta,* since there also the conviction of contempt was *reversed* in the Court of Appeals and this ruling was affirmed in the Supreme Court (*Rumely v. United States,* 197 F.2d 166 [D.C. Cir.], affirmed 345 U.S. 41).

The approach by the government in this case represents a new attack on the constitutional privilege. Heretofore, prosecutors hostile to the high purposes which the Fifth Amendment was intended to protect, have sought to whittle down its scope by urging upon the Courts narrow constructions and restrictive interpretations. Now that the law is settled that they were wrong all along in so doing (*Blau v. United States,* 340 U.S. 159; *Hoffman v. United States,* 341 U.S. 479; *Quinn v. United States,* 349 U.S. 155; *Emspak v. United States,* 349 U.S. 190; *Trock v. United States,* 351 U.S. 976), they seek to emasculate the amendment in other ways: by claiming waiver (cf. *Rogers v. United States,* 340 U.S. 367), or by suggesting that the claim was "premature" (cf. *United States v. Trock*, 232 F. 2d 839 [2 Cir.], reversed 351 U.S. 976), or, as here, by arguing that there was no "showing" to support what is otherwise apparently conceded to have been a valid claim of the privilege.[2] Forced as it is by the recent decisions of our highest tribunal to recognize that appellant was exercising a "precious constitutional privilege" (Brief for Appellee, p. 27), the government seeks to satisfy its high obligation in the premises by paying lip service to the privilege, whilst at the same time seeking by the most technical of objections to destroy it.

[2]See Brief for Appellee, p. 19, where it is conceded that the question as to employment "would have been potentially vulnerable". The same concession is made by the government respecting the question "concerning residence" in the companion case of MacKenzie (Brief for Appellee in No. 14,745, p. 10).

There is no justification whatsoever for the government's attempt to keep this Court in ignorance of the complete story of what went on in Portland at the time appellant was called as a witness before the Committee.

B. Even without such consideration, the "record" reveals a reasonable basis for the fear of self-incrimination.

In any case, the "record", even as the government narrowly construes it, contains more than enough to show that appellant properly invoked the privilege.

It appears from that very "record" that before appellant was called as a witness, the Subcommittee chairman made "an opening statement" in which he said that the purpose of the hearings was "to investigate communist and subversive activities in this area" (R. 49). It further appears from that "record" that it was in direct connection with that investigation that appellant was subpoenaed.[3] Thus, it appears that the Committee had reason to believe that appellant could given "information concerning communist activities in this area" (R. 50). Indeed, according to Subcommittee counsel, who was the only witness for the prosecution in this case, the Committee had "definite confidential information . . . that Mr. Wollam had associated with suspected communists . . ." (R. 51). With "that preliminary", to use the apt words which the prosecutor himself employed upon the trial (R. 51), appellant was called before the Subcommittee.

[3]Indeed, if this were not so, it is hard to see how any testimony appellant could have given would have been pertinent.

But that is not all. The "record" reveals that on June 17, 18 and 19, 1954 (appellant testified before the Subcommittee on June 19), there was substantial publicity in the Portland press concerning the purposes for which the hearings were being held (R. 84-87; Exhibits 18, 19 and 20). The "record" shows that before appellant was called, the press carried stories to the effect that the Committee was going to investigate "communist domination of labor unions" (R. 84); and that local officers "well known for . . . ferreting out subversion" were to be in attendance (R. 85).[4]

Certainly, no more was shown in *United States v. Trock,* 232 F. 2d 839 (2 Cir.), reversed 351 U.S. 976. There Trock had been called before a grand jury investigating thefts of goods in interstate commerce. He had been asked a series of questions relating to his address, his business, other names he may have used, etc. He refused to answer and, while asserting

[4]As we have already pointed out (Appellant's Opening Brief, note 20) this testimony was improperly excluded. *Alexander v. United States,* 181 F.2d 480 (9 Cir.); *Doran v. United States,* 181 F.2d 489 (9 Cir.); *Kasinowitz v. United States,* 181 F.2d 632 (9 Cir.); *Healey v. United States,* 186 F.2d 164 (9 Cir.); cf. *Emspak v. United States,* 349 U.S. 190, 200. The failure of appellant, appearing *pro se,* to assign this exclusion as error may not defeat his appeal as the government suggests (Brief for Appellee, p. 3), since an exception was allowed below (R 87) and in any case, in view of the foregoing decisions of this Court, which had been cited below (R 82), the ruling was plain error. F. R. Crim. Pro. 52(b).

As we also pointed out (Appellant's Opening Brief, p. 23), the attendance of law enforcement officers is an important factor in determining whether the claim of the privilege is validly asserted. *Hoffman v. United States,* 341 U.S. 479, 489; *Jackins v. United States,* 231 F.2d 405, 409 (9 Cir.); *Aiuppa v. United States,* 201 F.2d 287, 299 (6 Cir.).

a belief that his answers might incriminate him, he made no "showing" of how they might do so (see 232 F. 2d at 841).

As the "record" at bar contains the statement of the Committee chairman and counsel that Wollam was believed to have "associated with suspected communists" (*supra*), so in *Trock* the Assistant District Attorney had said that the government had reason to believe the defendant there "may have some knowledge" of the matters which the government was seeking to uncover (see 232 F. 2d at 840).

Taking the view that the questions were innocuous on their face and that the defendant was required to "show" how the answers would incriminate him, the Court of Appeals, over the dissent of Judge Medina, and with the dubious concurrence of Chief Judge Clark, affirmed the conviction. As we noted in our opening brief, the Supreme Court entered a *per curiam* reversal basing itself solely on *Hoffman v. United States,* 341 U.S. 479 (*Trock v. United States,* 351 U.S. 976). We have already pointed out that *Hoffman* held that the Court of Appeals, in assessing the validity of the anti-self-incrimination claim, should have considered the supplemental record because "justice" requires that the claim be sustained *whenever* facts appear which justify this result.

In *United States v. Courtney,* 236 F. 2d 921 (2 Cir.), decided after *Trock,* the Court sustained the claim of the privilege *on grounds urged for the first time on the appeal,* despite the complaint of the

dissenting judge that "[i]t took legal research after the event to discover" the provisions of law under which the appellant "conceivably could be prosecuted" (231 F. 2d at 925). Here we do not go so far. The grounds urged here are the same as those urged below and the "record" here, either with or without a consideration of the full proceedings before the Subcommittee, establishes the validity of the grounds so urged.

C. Appellant is not required to incriminate himself before he can obtain the advantages of the privilege against self-incrimination.

While the government here cites *Hoffman v. United States,* 341 U.S. 479, for the proposition that the "say-so" of the witness does not of itself establish the danger of incrimination (Brief for Appellee, p. 20), it neglects to note that the Court was careful immediately thereafter to qualify any such broad, sweeping observation. It said:

> "However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."
>
> *Hoffman v. United States,* 341 U.S. 479 at 486-487.

It is perfectly obvious here that once the "record" established the purpose of the inquiry and the belief on the part of the investigators that appellant had connections or associations with communists or communism, appellant was justified in claiming the privilege against self-incrimination and was not required to make any further showing. He was not required to surrender the protection which the privilege was intended to secure, in order to secure the benefits of the privilege. As Judge Medina said in the *Trock* case:

> "The protection of the Fifth Amendment would be a mere mockery if the witness could avail himself of the privilege only by demonstrating his guilt."
>
> *United States v. Trock,* 232 F. 2d 839 at 845.[5]

The fact that appellant has gone further than he needed and has directed attention to a public record which buttresses his claim of the privilege, in no wise derogates from the fact that enough was shown below, even without this, to sustain his claim, without requiring him to demonstrate his guilt.

D. The incriminating character of the questions asked is manifest.

Since the interrogation of appellant was premised upon the Committee's belief that he had "associated with suspected communists" (R. 51), and since evi-

[5]Even the dissenting judge in *United States v. Courtney,* 236 F.2d 921 (2 Cir.) recognized that "[w]hen the privilege is claimed, the judge seldom if ever has very much evidence before him to support the claim, for ordinarily only the witness knows enough of the facts and of course he should not be compelled to reveal them" (236 F.2d at 925).

dence had already been received concerning the unlawful purposes of communism, the concealment and deceit in the communist "underground"[6] including changes of names, identities and ages, the use of homes as secret meeting places for communists, etc. (Appellant's Opening Brief, pp. 2-7, 21-23), it is clear that the fear of self-incrimination was not an unreasonable one.

In addition to the authorities already cited in our opening brief (pp. 21-22, 27-29), we call attention to two cases recently decided by the Court of Appeals in New York: *United States v. Gordon,* 236 F. 2d 916 (2 Cir.), and *United States v. Courtney,* 236 F. 2d 921 (2 Cir.). In those cases it was hard to see the self-incriminatory character of answers to apparently innocuous questions and the prosecutor argued there, as he does here, that to sustain the privilege in such circumstances would be seriously to impair the government's investigative efforts. The answers to this argument was given by Judge Frank in the *Gordon* case:

> "That argument cuts too far: It would yield the patently illegal repeal by judges of the constitutional provision guaranteeing the anti-self-incrimination privilege. That provision unquestionably does sometimes impede enforcement of the criminal laws. But that was one of the clear purposes of the constitutional privilege, i.e., to

[6]Cf. *Kremen v. United States,* 231 F.2d 155 (9 Cir.), pending on certiorari in the United States Supreme Court, October Term 1956, No. 162.

prevent a court from compelling a witness—who might or not be a criminal—to give testimony which might incriminate him. All privileges not to testify have the same impeding effect . . .

"American prosecutors must learn to adjust themselves to these obstacles. The purpose of the Bill of Rights was, as Madison declared 'to oblige the government to control itself.' We are committed to the principle that any method of pursuing suspected criminals must give way when it clashes with these constitutional guarantees . . . Considered solely in terms of procedure, those constitutional safeguards seem logically indefensible. Considered, however, as conferring substantive rights, they assume a different significance: They express the high value our democracy puts on the individual's right of privacy." (236 F. 2d at 919-920.)

Nor can the suggestion that appellant had ulterior reasons for refusing to testify (Brief for Appellee, p. 15) change the result.

"If he was clearly entitled to assert the privilege, his motives for doing so are immaterial. See Taft, J., in Ex parte Irvine, C.C., 74 F. 954, 964-965; cf. United States v. St. Pierre, 2 Cir., 128 F.2d 979, 980."

United States v. Courtney, 236 F. 2d 921, 923 [2 Cir.].

Only by totally disregarding the Supreme Court's admonition not to interpret this constitutional protection in a "hostile or niggardly spirit" (cf. *Ullman v. United States,* 350 U.S. 422, 426), can one say that appellant's claim was not a valid one.

II.

THE INDICTMENT WAS DEFECTIVE FOR FAILURE TO ALLEGE THAT APPELLANT'S REFUSAL WAS UNLAWFUL, WILFUL, DELIBERATE, OR INTENTIONAL, OR WITHOUT JUST, PROPER, OR LEGAL CAUSE OR PROVOCATION.

The point has been fully covered in our opening brief (p. 17) and need not be here reargued. It should be noted, however, that the chief reliance of the government in opposition, *United States v. Deutch,* 235 F. 2d 853 (D.C. Cir.) (Brief for Appellee, pp. 14-15), is misplaced. The prosecutor clearly misreads the *Deutch* opinion and ignores its obvious inapplicability to the case at bar. For in that case, unlike this one, the indictment alleged that the refusal to answer was "unlawful", and the Court made it clear that this fact was decisive.

> "Any doubt . . . is resolved by the presence of the word 'unlawfully' preceding 'refused' in this indictment. That would satisfy the statute since a refusal would be unlawful only if it were wilful. In other words, if 'refused', standing alone, were held not sufficient because it does not connote a refusal which violates the statute, the presence of the word 'unlawful' would remedy that defect." (235 F. 2d at 854.)

Here the defect in the indictment is not remedied by the presence of the word "unlawful" or any similar word, and the *Deutch* case therefore is not applicable. This indictment, unlike that one, is therefore patently defective.

The prosecutor's reference to other cases in which the indictment contained neither the word "wilful"

nor "unlawful" is not well taken because there is not a single one of them in which the conviction was affirmed. In every one of them the conviction was reversed; the Courts therefore had no occasion to pass upon the point at issue. The prosecutor has not cited a single case in which an Appellate Court has said that an indictment which does not allege that the refusal to answer was unlawful, wilful, intentional, deliberate or without just, proper or legal cause, is a valid indictment. There is not cited a single case in which an Appellate Court affirmed a conviction upon an indictment alleging merely a refusal to answer.

This same point is presented by the briefs and arguments in *Simpson v. United States,* No. 14,743 in this Court, submitted for decision on November 16, 1956, and reference to that case is made for a further elaboration of appellant's position here.

III.

REMAINING QUESTIONS.

The balance of the argument—failure to plead facts showing pertinency, failure of proof of pertinency and wilfulness, and failure to direct an answer—is fully developed in our opening brief. We are of the view that nothing said in the government's brief has adequately met the argument we there made.

The heavy reliance upon cases decided long before *Quinn v. United States,* 349 U.S. 155; *Emspak v.*

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The heavy reliance upon cases decided long before *Quinn v. United States,* 349 U.S. 155; *Emspak v.*

United States, 349 U.S. 190, and *Trock v. United States,* 351 U.S. 976,[7] indicates that the government is still pressing for an approach to the Fifth Amendment privilege against self-incrimination which has been long since rejected by the Supreme Court and by this Court as well.[8] If this Court is to continue to reflect the position taken in the last few years and months by the Supreme Court, on the issues here presented, it can do no other than reverse this conviction.

Dated, San Francisco, California,
December 5, 1956.

Respectfully submitted,
GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
By NORMAN LEONARD,
Attorneys for Appellant.

[7]E.g., *United States v. Josephson,* 165 F.2d 82 (2 Cir.); *Barsky v. United States,* 167 F.2d 241 (D.C. Cir.); *Eisler v. United States,* 170 F.2d 273 (D.C. Cir.); *Lawson v. United States,* 176 F.2d 49 (D.C. Cir.).

[8]See this Court's recent decisions in *Jackins v. United States,* 231 F.2d 405 (9 Cir.); *Starkovich v. United States,* 231 F.2d 411 (9 Cir.); and *Fagerhaugh v. United States,* 232 F.2d 803 (9 Cir.).

No. 14,745

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN ROGERS MACKENZIE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S OPENING BRIEF.

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JOHN ROGERS MACKENZIE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S OPENING BRIEF.

This is an appeal (R 28) from a judgment of conviction (R 26) for violation of 2 U.S.C.A. 192 by reason of appellant's failure to answer certain questions propounded to him at a hearing of the Subcommittee of the House Committee on Un-American Activities. Appellant was sentenced to ten months imprisonment on each of four counts, the sentences to run concurrently and to pay a fine of $250 on the first count (R 27).

This appeal presents many questions of law and of fact identical with the questions presented in *Wollam v. United States* now pending in this Court,

No. 14,744. Wollam's brief is being filed contemporaneously with this one. In order to avoid unnecessary duplication, and pursuant to a stipulation filed herein on October 10, 1956, appellant will materially shorten this brief by incorporating herein many of the statements, points and arguments made in the Wollam brief. Where there are any significant differences between Wollam's case and appellant's case, this brief will consider them.

JURISDICTIONAL STATEMENT AND STATUTES INVOLVED.

Jurisdiction in this case is conferred by the same statutes as are involved in Wollam's case and the portions of his brief (pp. 1-2) dealing with such matter is hereby incorporated herein.

STATEMENT OF THE CASE.

MacKenzie was called to testify before the Subcommittee in Portland on June 18, 1954. The same "setting" which existed when Wollam testified and which is discussed in detail in Wollam's brief (pp. 2-5), also prevailed when this appellant was called to testify. In addition, it must be noted here that MacKenzie himself had been specifically identified as a member of the Communist Party (Hearings, p. 6614).[1]

[1]Reference is made to the appendix to the Wollam brief for further details of the testimony and for a complete picture of the "setting".

The questions which this appellant refused to answer had to do with his residence, his employment, his college education, and his age.[2] The House certified appellant's refusal to answer these questions to the United States Attorney for prosecution (R 49, Ex. 4), and appellant was thereupon indicted for violation of 2 U.S.C.A. 192. The indictment was substantially in the same form as the indictment in the Wollam case. Pre-trial motions, identical with those filed by Wollam, were here made and denied (R 5-6, 9-10, 20). The case was thereafter brought to trial, and after the Government had concluded its evidence, a motion for a judgment of acquittal was made pursuant to Rule 29, F. R. Crim. Proc. and was denied (R 68-70). Appellant was subsequently found guilty on all counts. A motion for a new trial on the same grounds as urged by Wollam was made and denied (R 25-26). Thereafter, appellant was sentenced to imprisonment and to pay a fine (R 26-27), and this appeal followed (R 28).

SPECIFICATION OF ERRORS.

Appellant hereby adopts the Specification of Errors numbered 1 to 5, inclusive, set forth in the brief in the Wollam case (pp. 9-10), and by this reference incorporates the said Specification of Errors herein as though fully set forth at this point.

[2]Count I: "Mr. MacKenzie, what is your present residence?"
Count II: "Mr. MacKenzie, where are you employed?"
Count III: "Did you ever attend Reed College?"
Count IV. "What is your present age, sir?" (R 4).

SUMMARY OF ARGUMENT.

Appellant hereby adopts the summary of argument under Points I to III, inclusive, set forth in the brief in the Wollam case (pp. 10-11), and by this reference incorporates said points herein as though fully set forth at this point.

ARGUMENT.

I.

THE INDICTMENT DID NOT PROPERLY CHARGE EITHER PERTINENCY OR WILFULNESS AND THE EVIDENCE FAILED TO ESTABLISH EITHER OF THESE ELEMENTS.

The argument made by Wollam under Points I and II of his brief (pp. 12-20) is equally applicable here. Appellant adopts it in its entirety by this reference.

1. The questions involved in the first three counts of the indictment here, seeking, as they did, to elicit information as to appellant's residence, employment and attendance at Reed College, are indistinguishable in law and in fact from the questions discussed in Wollam's brief. For the reasons there assigned, it must be held that these questions were not pertinent to the inquiry.

2. The fourth question asked of this appellant sought to elicit his present age. This is the only question of its kind asked of appellant and not of Wollam. As to it, however, it is also clear that it was not pertinent. What John MacKenzie's age was—thirteen or thirty—could hardly be relevant to any valid Congressional purpose. It is impossible to see how

Congress could have more intelligently drafted legislation if it knew how old this appellant was. Like the other questions put, this question was an incursion into appellant's "private affairs" and was "unrelated to a valid legislative purpose" (*Quinn v. United States,* 349 U.S. 155, 161) and can no more be made the basis of a judgment of conviction than can any of the other questions.

3. As to all four of the questions, the record fails to show the wilfulness and deliberateness required to constitute the offense. The record here, as in Wollam's case, shows affirmatively that appellant was asserting in good faith what he believed to be valid objections to the questions put. Like Wollam, appellant here relied upon advice of counsel, and did not manifest that contemptuous attitude which is an element of the offense. We show below that the objections pressed by appellant were well taken, but in any case it cannot be said that they were urged in bad faith. Here, as in the Wollam case, the essential element of wilfulness is lacking.

II.

APPELLANT WAS CLEARLY ENTITLED TO INVOKE THE PRIVILEGE AGAINST SELF-INCRIMINATION.

The "setting" in which appellant was asked the four questions here involved was identical with that which faced Wollam when he was called to testify. Appellant, like Wollam, knew that the Committee was seeking to ferret out subversion and that it was

endeavoring to link him with the Communist Party; indeed, one witness had already identified him as a member of the Communist Party (Hearings, p. 6614).

His apprehension of prosecution for any of the various crimes already specified in the Wollam brief (p. 22) was certainly not unreasonable and he was entitled to exercise the privilege against self-incrimination.

1. It has long since been determined in this Circuit that in a setting such as we have here, a witness is not required to answer questions dealing with residence[3] and employment (*Starkovich v. United States,* 231 F. 2d 411 (CA 9); *Jackins v. United States,* 231 F. 2d 405 (CA 9); *Alexander v. United States,* 181 F. 2d 480 (CA 9), and related cases cited in the Wollam brief [p. 21]). The cases from the Supreme Court and the other Circuits are also collected in the Wollam brief under Point III (pp. 20-29).

2. For the reasons specified in the Wollam brief under Point III B 3 (pp. 25-26), it is equally clear that the question as to whether appellant ever attended Reed College was one which, considering the testimony that had been given that there was a Communist Party club at the college, he had the right to refuse to answer.[4] His answer might well have been

[3]Indeed Committee counsel specifically asked appellant if it weren't "a fact . . . that Communist Party meetings were held in your home?" (Hearings, p. 6654).

[4]We are not presented in MacKenzie's case with the questions of elementary and high school education which are discussed in the Wollam brief. In MacKenzie's case the question went immediately,

the first bit of foundational evidence upon which the government could have connected him with such activity.

3. The other question asked of MacKenzie, having to do with his "present age", might well also have been incriminating. In connection with this, it will be remembered that witnesses had already testified that in the Communist "underground", persons adopted new and different identities, and changed not only their names, social security numbers, residences, but also their *ages* (Hearings, p. 6643). A question which would require a witness to state his age might very well lead to an identification of the witness as a person who, at a certain time, was or had been associated with Communist or subversive activities.[5] Committee counsel himself admitted that the question was a "definite identifying question" (R 47).

Under all the circumstances, the decisions in *Hoffman v. United States,* 341 U.S. 479, and *Trock v. United States,* 351 U.S. 976, as well as the other cases cited in Wollam's brief, make it clear that appellant's invocation of the privilege against self-incrim-

not merely to education on a college level, but specifically to attendance at Reed College which, as has been indicated, was the alleged scene of Communist and subversive activities.

[5]In connection with another witness before the Committee, and one whose appeal is also pending in this Court (*Simpson v. United States,* No. 14,743), one of the "friendly" witnesses was asked to make identification by stating the witness' age (Hearings, p. 6619); as to another person (Spencer Gill) the identification was also made in the same manner (Hearings, p. 6622).

ination was justified and that he is entitled to a reversal with instructions to enter a judgment of acquittal.

Dated, San Francisco, California,
October 15, 1956.

Respectfully submitted,
GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
By NORMAN LEONARD,
Attorneys for Appellant.

NO. 14,745

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN ROGERS MacKENZIE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

On Appeal from the Judgment of the United States District Court for the District of Oregon.

C. E. LUCKEY
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FILE

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BRIEF FOR THE APPELLEE

On Appeal from the Judgment of the United States District Court for the District of Oregon.

OPINION BELOW

The judgment of the District Court was rendered upon jury verdict without an opinion.

JURISDICTION AND STATUTES INVOLVED

By order of this Court permitting it, adoption of the like sections in the brief filed contemporaneously in *Donald M. Wollam v. United States of America,* No. 14,744, is made by reference.

QUESTIONS PRESENTED

Appellee hereby adopts by reference the Questions Presented listed as numbered 1 to 7, inclusive, in Appellee's *Wollam* brief.

COUNTER STATEMENT OF THE CASE

Appellant was called as a witness before a public session of a Subcommittee of the House Un-American Activities Committee. Preliminary questions to establish for the Committee the identity and background of the witness were asked him. He refused to answer them, claiming privilege. These concerned his residence, his employment, his college education and age. In support of a motion to dismiss the indictment, appellant filed an affidavit (R. 6-9), in which he stated his employment, general background and his college education. He did not therein state his exact address, but stated that he was a resident of Clackamas County, Oregon. Further, at the time of the arraignment, appellant, through his counsel, expressed the desire to purge himself of the contempt and was allowed time to make a showing thereon, although he did not do so (R. 19).

Appellant in his brief has relied on evidentiary matter outside the record and not submitted to the trial court.

The trial court found the questions pertinent, the refusals to answer not privileged, and the jury found the appellant guilty of refusal to answer the questions after being instructed that in order to make such finding they must find the refusals were deliberate, not accidental or inadvertent.

No issue is presented contesting the Subcommittee's directions to answer and the denial of the claim of privilege.

SUMMARY OF ARGUMENT

Appellee adopts by reference the Summary of Argument's first two paragraphs of that topic in Appellee's Brief in the *Wollam* case, except that herein, R. 35-49 is referred to instead of R. 50-60 as in the *Wollam* brief. Appellant has improperly relied on appeal on evidence not found in the record. The indictment and proof were sufficient.

The proof supports the jury verdict that the appellant acted wilfully, deliberately and intentionally, not inadvertently. The court found the identifying questions pertinent and the refusal to answer them not privileged. The record supports these rulings.

The appellant failed at the trial, through any evidence, to show the trial court anything that would support the claim of privilege. The claim of the witness that answer would incriminate him does not of itself establish the hazard. *Hoffman v. U. S.*, 341 U.S. 479, 1951. The burden of going forward with the evidence may shift. *U. S. v. Fleischman,* 339 U.S. 349, 360, 1950.

The Subcommittee clearly directed the appellant to answer the questions and denied his claim of privilege. This element is undisputed in this case.

ARGUMENT

I. Upon an Appeal in a Criminal Case, the Appellate Court Will Not Consider Additional Evidence Which Had Not Been Presented to the Trial Court.

Appellee adopts by reference its argument on this topic in the *Wollam* case (pp. 6-8, incl., *Wollam* brief).

II. On Review of Judgment in a Criminal Case, the Appellate Court Will Not Take Judicial Notice of Evidentiary Matters Not Called to the Attention of the Trial Court.

Appellee adopts by reference its argument on this topic in the *Wollam* case (pp. 8-10, incl., *Wollam* brief).

III. The Indictment Properly Charged, and the Proof Established, the Pertinency of the Questions Asked Appellant.

A. *The Indictment Properly Charged Pertinency of the Questions Asked Appellant.*

The discussion in the *Wollam* brief on this topic (pp. 10-12, incl.) is equally applicable here, and is adopted in full by reference herein.

B. *The Proof Supported the Court's Findings of Pertinency.*

The first two paragraphs of the *Wollam* brief (pp. 12-14, incl.) on this topic are incorporated herein by reference.

In addition, the testimony explains their pertinence (R. 35-49). Particularly we invite the court's attention to the testimony of the witness Kunzig concerning identifying questions. On cross-examination at R. 62, he said:

> "We want to get identifying questions and find out—we always ask these identifying questions to

> find out where the person lives, perhaps his age, his place of employment, and his name, because we have to know who it is that is sitting in front of us. These two Congressmen would go back to Washington, D. C., and say, 'We had some fellow sitting before us in some city out West who said something or other.' We have to go back and say, 'We had this witness. His name is Mr. MacKenzie. He lives at such-and-such address, and he said the following things under oath and gave us the following information under oath, and we now turn it over to you, the Congress, to pass legislation based upon what he said.' "

The objection, which seemed to be the theory of defense at the trial that the Subcommittee already knew the answers to the questions, would, if true, be no defense. *Young v. U. S.*, D.C. Cir. 1954, 212 F. 2d 236, 239, cert. den. 347 U.S. 1015, 1954.

Exhibit 5, introduced in evidence by the government at the trial contains the full testimony of appellant before the Subcommittee. That the questions were pertinent, in addition to being so on their face because of their preliminary identifying nature, were explained to be so by testimony at trial (R. 43-49, incl. and 61-63, incl.).

Appellee is unable to understand and submits that the court should reject appellant's contention that whether the witness' age was 13 or 30 was irrelevant. *Barsky v. U. S.*, D.C. Cir. 1947, 167 F. 2d 241, cert. den. 334 U.S. 843, 1948. Such a contention ignores the importance of knowing the full background of a witness to better evaluate his experience and testimony.

IV. The Indictment and Proof Were Sufficient With Regard to the Element of "Wilfulness".

A. *It Is Not Necessary to Specifically Allege Wilfulness in the Charge.*

The discussion of this topic in the *Wollam* Brief for Appellee is adopted and incorporated herein by reference (*Wollam* Brief, pp. 14-15).

B. *The Proof Established that the Appellant's Refusals Were Deliberate, Intentional and Wilful.*

Except for the second and concluding paragraphs of the discussion of this topic in the Appellee's Brief in the *Wollam* case, which appear inapplicable herein, the discussion in the *Wollam* case (pp. 15-17, incl.) is adopted and incorporated herein.

The testimony (Ex. 5, Trial Exhibits) shows the clear instructions and directions to answer, the warning of the possibility of a contempt citation for refusal, and the clear refusals of appellant to answer on the claim of privilege of every question except his name. The jury would have had no basis for finding the refusals were inadvertent or unintentional.

V. The Trial Court Properly Ruled That the Appellant Was Not Entitled to Invoke the Privilege Against Self-Incrimination.

A. *The "Setting" and Circumstances Did Not on the Record Support a Reasonable Fear of Self-Incrimination.*

Appellant newly asserts, drawing upon evidence outside the record, that the Committee was endeavoring to

link him with the Communist Party. He also complains of the "setting" by reference to the *Wollam* Appellant's Brief.

That some peace officers were in attendance at the Committee hearings does not justify fear of self-incrimination.

There is nothing in the setting that in itself is of an incriminating nature for the appellant. The position of the appellant would seem to be that any witness subpoenaed before the Un-American Activities Committee of the House is *ipso facto* on his say-so entitled to claim privilege as to any question asked him.

B. *Answers to the Questions Asked Could Not on the Record Have Incriminated Appellant.*

Appellant states that this Circuit has ruled that in a setting such as was present here, a witness is not required to answer questions dealing with residence and employment, citing *Starkovich v. U. S.*, 9 Cir. 1956, 231 F. 2d 411; *Jackins v. U. S.*, 9 Cir. 1956, 231 F. 2d 405; *Alexander v. U. S.*, 9 Cir. 1950, 181 F. 2d 480. Appellee does not so understand these decisions. In fact, the *Alexander* decision supports the position of the appellee at p. 482, wherein the opinion states:

> "Hence the burden is on appellants to show that they had substantial reason to believe they (the questions) call for answers tending to incriminate them."

The setting in that case was a grand jury. The court also, at p. 486, accords further support to the government's position when it says:

> "Our decision in *Miller v. United States,* 9 Cir., 95 F.2d 492, 494, is not inconsistent with the impossibility rule of the *Arndstein* decision. There we affirmed the district court's conviction for a criminal contempt because, *the burden being on the witness to show the trial court her apprehension of a prosecution in which her declined answer might tend to impugn her,* the evidence on which the trial judge based his decision was not before us." (Emphasis supplied)

The court in the *Alexander* case considered that the question as to employment in the particular setting might be incriminating because some of the witnesses had stated that their occupation was "organizer", and considered with other questions, the answer might well involve being an organizer for the Communist Party. No such circumstances are present herein. The *Jackins* case is only authority for the proposition that in that case the question regarding employment could have involved an incriminating answer. As pointed out in the *Wollam* Appellee's Brief, the *Jackins* case involved answer to a question covering the entire employment history of Jackins from 1935 to 1954 in a setting which the record showed gave the witness there reason for belief that he had been identified as a "full time functionary" of the Communist Party.

The *Starkovich* case, *supra,* does not clothe all questions as to residence with immunity as incriminating in any situation where a witness is being questioned by a Congressional Committee. It only held that on the record in that case because a person of the name of the witness had been stated to be a Communist, and there were two persons of that name discussed, identity of

one discussed could be assisted by identifying the residence of the witness, and this identity therefore could seemingly be incriminating.

Residence is in itself innocuous. The appellant had the burden of showing the trial court in what way answer to the question would cause apprehension of incrimination. He did not do so. In fact, the emphasis at the trial was directed toward the question of pertinence, the defense by the appellant then appearing based on the notion that the Committee had the answers to the questions asked, and that they were therefore somehow not pertinent. Good faith and advice of counsel, if shown, would have been immaterial. *U. S. v. Costello,* 2 Cir. 1952, 198 F. 2d 200, cert. den. 344 U.S. 874, rehearing den. 344 U.S. 900, 1952; *Eisler v. U. S.,* D.C. Cir. 1948, 170 F. 2d 273, cert. den. 338 U.S. 883, 1949.

Appellant contends that he was entitled to claim privilege and refuse to answer the question: "Did you ever attend Reed College?". Appellee submits that the claim of privilege was and is sham. The trial court had before it the Affidavit of the appellant filed in support of his motion to dismiss indictment (R. 6-9, incl.). In that Affidavit, appellant gave his complete educational history, including mention of about one term at Reed College.

He also stated therein that he had been employed with the Fred Meyer organization in Portland for about three years at the time of the hearings, and although not giving his exact address, stated that he was a resident of Clackamas County, Oregon. These are not the

acts and statements of one in genuine apprehension of self-incrimination.

Again resorting to matter outside the record, appellant asserts that stating his age might well have been incriminating, and spins a fanciful and speculative web never urged upon the trial court. The question was identifying—but of appellant *as a witness before the Committee*.

The appellee must in candor suggest that the question concerning residence might conceivably have been incriminating had appellant suggested to the trial court that the Committee counsel had suggested that Communist meetings had been held in appellant's home. That someone may have made such a statement does not in itself mean that the statement was true, or that thereby the witness actually feared incrimination, or would have been incriminated by giving an answer. At the time privilege was claimed to the residence question, the subsequent inferentially incriminating question had not been asked. The trial court must evaluate the reality of the possibility of the incrimination and in doing so must look to the defense made by appellant. The appellant's position during the trial of the cause below was that the appellant's residence was not pertinent (R. 62).

It is submitted that the fact that a third party may make or have made statements prejudicial to the witness is not in itself a basis of assertion of the claim of privilege, in the absence of actual basis for apprehension of prosecution, at least from the point of view of the witness faced with an ambiguous circumstance. The

claim of privilege is not a sinecure for those desiring to remain silent on their own say-so for their own choice of reasons. Appellee suggests that the true reason for the refusal to answer supported by the entire record is not fear of incrimination, but a desire to frustrate the Committee, expressed by appellant in his Affidavit in support of motion to dismiss indictment when he stated:

> "Furthermore, that in refusing to answer these questions, I was not only upholding my Constitutional right but was aiding all the American people in preserving our democratic heritage."

We submit that MacKenzie's personal philosophy of what was of aid to the American people cannot supersede the requirement that he in good faith claim privilege and that the claim be not on the basis of that personal philosophy, but only on his genuine apprehension based upon some reasonable hypothesis that answer to the questions would incriminate him.

VI. Appellant Was Properly Directed to Answer the Questions, in Each Count.

In this case there is no allegation that the directions to answer and denial of the claim of privilege suggested by the cases of *Quinn v. U. S.*, 349 U.S. 155, 1955; *Emspak v. U. S.*, 349 U.S. 190, 1955, and *Bart v. U. S.*, 349 U.S. 219, 1955, were not fully sufficient. The directions were given in clear and unmistakable fashion by the Subcommittee, as to each question charged.

CONCLUSION

The appellant was convicted by a jury of four counts of wilful refusal to answer pertinent questions as a witness before a Congressional Subcommittee. Affirming conviction as to any count will sustain the judgment because the sentence is well within the statutory penalty for violation of a single count. *Sinclair v. U. S.*, 279 U.S. 263, 299, 1929; *Lowden v. U. S.*, 9 Cir. 1951, 187 F. 2d 484.

The questions were on their face innocuous, and the appellant made no trial showing that answering would incriminate him, or that he should have reasonable apprehension that to answer would do so. Because the witness himself is not exonerated from answering merely because he declares that in so doing he would incriminate himself, he had the burden of going forward with some showing to the trial court. *Hoffman v. U. S.; U. S. v. Fleischman, supra.* This he did not do.

The court correctly ruled, and the record supports its rulings, that the questions were pertinent and the refusals to answer them not privileged.

Appellee submits that unless this court is prepared to say that any witness subpoenaed to appear before the House Un-American Activities Committee is by reason thereof placed in a position of reasonable apprehension of self-incrimination sufficient to justify his claim of privilege and to entitle him to claim privilege and refuse to answer any, even innocuous, questions put to him, without further showing of hazard of incrimination, the court should not reverse this conviction.

On any other basis on this record, appellee submits reversal would do violence to the right of government, generally, and even of courts, to compel testimony and have fair opportunity to judge the merits of asserted privilege against self-incrimination. The conditional right to remain silent would be unassailable and absolute.

Appellant was not entitled to defend his refusals to answer on one theory and with chosen evidence at the trial below, and having lost, on appeal defend on another basis and with asserted evidence he did not choose to present in the court below.

The conduct of appellant here is in principle comparable to *U. S. v. Josephson,* 2 Cir. 1948, 165 F. 2d 82, cert. den. 333 U.S. 838, 1948. A like result should follow.

That the privilege against self-incrimination is entitled to liberal construction does not require the court to substitute imagination for reality, nor does it merit the court's becoming the advocate, nor charge the court with responsibility to conjure speculative hazards of incrimination.

The judgment should be affirmed.

Respectfully submitted,

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November, 1956

No. 14,745

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN ROGERS MACKENZIE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S REPLY BRIEF.

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No. 14,745

IN THE

United States Court of Appeals

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JOHN ROGERS MACKENZIE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S REPLY BRIEF.

Here, as in *Wollam v. United States,* No. 14,744, we shall not reargue the case in chief but shall respond only to those matters urged by the Government which we deem require comment. Furthermore, by reason of the stipulation and order heretofore filed herein, we shall materially shorten this brief by making reference to our reply brief in the *Wollam* case.

I.

In this case, as in Wollam's, the argument is made that this Court may not examine the full transcript

of the testimony taken by the subcommittee. For the reasons assigned in our *Wollam* Reply Brief, we believe that this position is not well taken.

In any event, the "record" before the trial Court here contains sufficient to show the basis upon which appellant feared self-incrimination. Thus, committee counsel testified that "the committee was here investigating subversive and un-American activities in this area" (R. 40), and in response to a question respecting the committee's "purpose" of subpoenaing witnesses before the committee, he replied:

> "The committee was possessed of information from confidential investigative sources . . . that people in this area, one of whom was the defendant here today, had information on the general subject of communism and subversive activities in this area . . ." (R. 41).

More specifically, when asked why appellant particularly was called as a witness, committee counsel replied:

> "Well, in Mr. MacKenzie's case, personally and particularly, the committee, as I said a moment ago—when I was speaking in general—the committee had information with regard specifically to Mr. MacKenzie, that he was possessed of information concerning communist and subversive activities in this area . . ." (R. 42).

With respect to each of the four questions asked of appellant, the "record" is equally clear that the purpose was in some way to connect appellant with "com-

munist infiltration" into industry (R. 46) or education (R. 47-48). See, also, R. 57, 62.

In this case, as in Wollam's, the "record" contains an offer of material from Portland newspapers published preceding the time appellant was called, which further demonstrates the basis for his fear of self-incrimination (R. 72-74; Exhibits 10, 11 and 12).

II.

The Government makes the added point here that the claim of the privilege made before the Subcommittee was not made in good faith because subsequently, during the course of the trial below, appellant filed an affidavit in support of his motion to dismiss in which he averred that he was a resident of Clackamas County, Oregon (Brief for Appellee, p. 2), and that he had attended one term at Reed College (Brief for Appellee, p. 9). But this totally ignores the difference in the "settings". Before the trial Court, appellant was not facing a committee determined to ferret out his connections with the Communist party, and he had no reason to fear that his statements to the trial judge would be the basis of further questions tending to link him with communism.

His conduct at the trial does not constitute abandonment of his prior claim, but even if it did, this would have no effect upon the validity of the claim at the time he asserted it.

In *Bart v. United States,* 349 U.S. 219 at 222, it was said:

> "An abandonment made two and one-half years after the objections were raised cannot serve retroactively to eliminate the need of a ruling. If the requirement of criminal intent is not satisfied at the time of the hearing, it cannot be satisfied *nunc pro tunc* by a later abandonment of petitioner's objection."

In *United States v. Rumely,* 345 U.S. 41 at 48, it was said:

> "In any event, Rumley's duty to answer must be judged as of the time of his refusal."

It is clear from the foregoing, that appellant's refusals must be tested in the light of the situation as it existed when he was called before the Committee, and not in the light of some other situation which subsequently developed.

III.

Here as in *Wollam* the Government lays store by the "personal philosophy" of appellant which it says demonstrates that his claim was not made in good faith (Brief for Appellee p. 11). As we pointed out in *Wollam,* if appellant had a lawful basis for declining to answer, his motives were immaterial.

The Government also argues, as it does in *Wollam,* to sustain the claim of the privilege in this case will deprive it of its right to obtain testimony by com-

pulsion. Judge Frank's observations in *United States v. Gordon,* 236 F. 2d 916 (2 Cir.), which we quoted in our *Wollam* Reply Brief, are a complete answer to this contention.

Finally, conceding that some of the questions "might conceivably have been incriminating" (Brief for Appellee, p. 10), the Government nonetheless urges that the conviction for refusal to answer others may be upheld. We have shown in our Opening Brief why all of the questions were incriminating, but even if this were not so, the Government's position is not tenable.

> "The government argues that answers at least to some of the questions, when taken singly, are remote from any tendency to incriminate. Even so assuming *arguendo,* we reject that argument for these reasons: The questions together form such a cluster as to interrelated matters that to separate out any one of them, treating it as if it stood alone, would be to artificialize the actualities. Moreover, although the same situation existed in Trock's case, the Supreme Court did not deal with any one of the questions singly but sustained the privilege as to all."
>
> *United States v. Gordon*, 236 F. 2d 916, 920, (2 Cir.).

In *Maffie v. United States,* 209 F. 2d 225 (1st Cir.), Chief Judge Magruder disposed of a similar contention in this manner:

> "It is possible that a few of the questions which Maffie declined to answer could have been answered without any tendency to incriminate him;

but if so, the answers to this small residue would have been so far removed from any disclosures possibly useful to the prosecution that it would have been a perfectly futile thing to order Maffie to go back to the grand jury to answer them. We would be reluctant to uphold a conviction for criminal contempt based upon a refusal to obey the District Court's order as far as this insignificant residue is concerned; it would be too much like a case of the tail wagging the dog." (209 F. 2d at 231.)

IV.

We do not discuss here, because we have thoroughly covered it in our *Wollam* Reply Brief, the failure of the indictment to allege that appellant's refusal was wilful or unlawful or without just or proper cause or excuse. Nor do we consider here, because we feel that the points have adequately been covered in the Opening Brief, questions relating to pertinency and insufficiency of the evidence. Our failure to discuss them is obviously not to be construed as a waiver. On the contrary, we urge the points strongly but simply feel that no good purpose will be served in lengthening this brief by a repetition of arguments already made.

In conclusion, it seems clear, from the entire picture before this Court, that this is a case in which a witness properly claimed the privilege against self-incrimination. At the time he was called to testify he had been

identified as a Communist and placed in Communist party meetings. He knew that the purpose of the inquiry was to connect him with the communist movement. He had a perfect right therefore not to answer any questions which might conceivably establish that connection or even give the Government a lead in that direction. The recent decisions of the Supreme Court and of this Court require that his conviction be reversed.

Dated, San Francisco, California,
December 5, 1956.

Respectfully submitted,
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No. 14,760

IN THE

United States Court of Appeals

For the Ninth Circuit

JACK SHOWELL AND DOROTHY SHOWELL,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Brief for Petitioners

On Petitions for Review of the Decisions of The Tax Court of the United States.

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No. 14,760

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On Petitions for Review of the Decisions of The Tax Court of the United States.

OPINION BELOW

The only previous opinion is that of the Tax Court of the United States promulgated December 16, 1954. The findings of fact and opinion of the Tax Court are reported at 23 T.C. 495.

JURISDICTION

This appeal involves income taxes. By two notices of deficiency, each dated February 26, 1953, addressed separately to Jack Showell

and Dorothy Showell, the Commissioner of Internal Revenue determined deficiencies of $3,946.65 and $4,065.69 respectively for the taxable year 1949 (R. 6, 7, 121). Identical petitions, under the authority of Section 272 (a) of the Internal Revenue Code of 1939, were filed in each case with the Tax Court of the United States on April 30, 1953 for a redetermination of the deficiency set forth in each notice of deficiency (R. 4, 121). The decisions of the Tax Court were entered on January 26, 1955 (R. 27, 28). Said decisions found that there was a deficiency in income tax for Jack Showell in the amount of $3,286.65, and a deficiency in income tax for Dorothy Showell in the amount of $3,392.25. The cases were brought to this Court by separate Petitions for Review filed on March 9, 1955 (R. 29, 121). The jurisdiction of this Court to review the aforesaid decisions of the Tax Court is founded on Sections 7482 and 7483 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED

Instead of asserting deficiencies on the basis of either the bank deposits or net worth and disbursements methods, the Commissioner relied wholly on the correctness and veracity of petitioners' own permanent record, in evidence as Exhibit 3, as the sole basis of his deficiency notices (R. 45). This fact is revealed by the testimony of the examining agent, U. S. Internal Revenue Agent H. L. Mende, who testified on direct examination as follows:

> "Q. Mr. Mende, is the Exhibit 3, which is now in evidence, the only source of the amount of $11,281.83 set forth in the notices of deficiency?
>
> A. To the best of my knowledge and belief, it is." (R. 45).

Thus, it was found that all of the entries appearing in the "Gain" column of Exhibit 3 were accepted by the Commissioner while all, except four entries representing certain expense items, in the "Loss" column were rejected (R. 16-18, 51). Such action was taken by the Commissioner in spite of the fact that the entries made in both the "Gain" and "Loss" columns were net gains or net losses (R. 15). That is, the total of all losing bets was deducted from the total of all winning bets and the resulting net gain or net

loss entered on Exhibit 3 under the "Gain" column if a net gain or the "Loss" column if a net loss (R. 14, 15). In explaining the above *method* used to determine petitioners' correct income, the examining agent testified as follows:

> "Q. Were any of the gains or losses used in computing the 'Gain' column substantiated?
>
> A. No more than the losses.
>
> Q. In other words, is it correct to say that you accepted all of the amounts in the 'Gain' column and rejected all the amounts in the 'Loss' column?
>
> A. Except those expenses I told you about." (R. 51).

From the above material, it is clear that the Commissioner accepted the method of accounting regularly employed by petitioners (R. 104), and the truthfulness and accuracy of his permanent record (Exhibit 3) for the purpose of computing and asserting deficiencies in tax. However, it is also equally clear that the Commissioner rejected the same method of accounting, and the accuracy and truthfulness of the same record or piece of paper (Exhibit 3) when any entries resulted in the conclusion that no additional income had been realized.

No testimony or evidence of any kind was introduced by the Commissioner at the trial of this cause except for the original 1949 federal income tax return of each petitioner. In fact, the Commissioner's counsel frankly stated in the opening statement:

> ". . . You may wonder why we are here in such a case, but this is somewhat of a test case to see how far a person engaged in the betting and booking business may operate without keeping the usual records which are kept by a merchant and a man in business . . ." (R. 39).

The Tax Court sustained the Commissioner's action in substance by holding that the "Loss" column entries were reliable only to the extent of $3,000 more than the four expense item entries. The Tax Court did not state which of the entries were reliable and which were unreliable, or why the "Loss" column entries were reliable only $3,000 worth. The effect of this finding was to disregard a total of $20,144.77 in record entries appearing in the "Loss" column (R. 17, 18).

With the above summary in mind, petitioners' counsel state frankly to this Court that this appeal was taken in the belief that the record will show that rules of evidence, the rules respecting legal presumptions and burdens of proof, the record, and federal income tax law have all suffered as a result of the irrelevant fact of the nature of one of petitioners' businesses in 1949.

The first issue before this Court arises from the decisions of the Tax Court sustaining the deficiencies as set forth above. The first question is whether such decisions are not supported by the evidence, are clearly erroneous, and are not in accordance with law.

The second issue arises from the refusal of the trial judge to admit evidence concerning petitioners' net worth and disbursements for 1949. The second question is whether such evidence is relevant and material, as some proof that the Commissioner's determination of additional income is erroneous, in a case where the Commissioner is challenging the reliability and sufficiency of taxpayer's books and records.

SPECIFICATION OF ERRORS RELIED ON

1. The Tax Court erred in treating as evidence the legal presumption of correctness which attaches to the Commissioner's determination.

2. The Tax Court erred in finding as fact that petitioners realized additional income of $19,563.66.

3. The Tax Court erred in that its decisions are not supported by the evidence, are clearly erroneous, and are not in accordance with law.

4. The Tax Court erred in refusing to admit evidence relating to petitioners' net worth and disbursements for 1949 as some proof that additional income of $22,563.66 was not realized. At the trial petitioners offered testimony evidence of Mr. Showell regarding the personal disbursements of petitioners for the year 1949 (R. 84, 85). The evidence was offered to supplement evidence already in the record concerning petitioners' beginning and ending net worth for the year 1949 (R. 75-84; Exhibit 9) as some proof that personal expenditures were not such that the net worth statement could be incorrect (R. 85). The Tax Court sustained

an objection by Commissioner's counsel that the offer of evidence regarding petitioners' personal disbursements was immaterial and irrelevant (R. 85, 86) although petitioners' counsel stated when net worth and disbursements evidence was first offered that it was appropriate evidence to prove that a deficiency was not possible (R. 77).

ARGUMENT

I

In turning to the initial issue, petitioners note that the first three errors specified are related and interwoven. For instance, whether the Tax Court's decisions are not supported by the evidence, are clearly erroneous, and not in accordance with law, is connected with the question of whether the Tax Court treated as evidence the legal presumption of prima facie correctness which attaches to the Commissioner's determination. Likewise, whether the Tax Court erred in finding as fact that petitioners realized additional income of $19,563.66 is dependent on whether its decisions are not supported by the evidence, are clearly erroneous, and not in accordance with law.

The review of Tax Court decisions by United States Courts of Appeals are taken and treated in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. Section 7482, Internal Revenue Code of 1954. This means that the findings of fact of the Tax Court are subject to scrutiny by the United States Courts of Appeals, and the Tax Court's decision will be set aside if clearly erroneous, *Hatch's Estate v. Commissioner,* 9 Cir., 1952, 198 F. 2d 416, if not supported by the evidence, *Wright-Bernet, Inc. v. Commissioner,* 6 Cir., 1949, 172 F. 2d 343, and not in accordance with law, *Gillette's Estate v. Commissioner,* 9 Cir., 1950, 182 F. 2d 1010. A finding of fact is clearly erroneous when, even though there is evidence to support it, the appellate court "on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gillette's Estate v. Commissioner,* 9 Cir., 1950, 182 F. 2d 1010, 1014. Should the Tax Court decision lack substantial

evidence to support it, it will be considered as clearly erroneous and not supported by the evidence. *Wright-Bernet, Inc. v. Commissioner,* 6 Cir., 1949, 172 F. 2d 343. If "every part of the substantial evidence properly related to the whole of the evidence points unmistakably to the conclusion that it is wrong," the decision is "not in accordance with law." *Gillette's Estate v. Commissioner,* 9 Cir., 1950, 182 F. 2d 1010, 1014.

In the instant case, the Commissioner offered no testimony or documentary evidence except the original federal income tax return of each petitioner. Petitioners, on the other hand, placed into the record the testimony of four witnesses (R. 41-116) and several pieces of documentary evidence (R. 44, 66, 67, 70, 72, 77) contra to the Commissioner's determination. The testimony of none of the witnesses was impeached on cross-examination (R. 44, 52-54, 87-104, 107-109, 113-115, 116-117). In fact, the testimony of petitioner Jack Showell was the only foundation in the record for virtually every finding of fact made by the Tax Court except four and the ultimate finding of fact. When the majority opinion ruled that the burden of proof had not been carried, it both violated the rule laid down in *Hemphill Schools, Inc. v. Commissioner,* 9 Cir., 1943, 137 F. 2d 961, that the presumption of correctness attaching to the Commissioner's determination does not constitute evidence, and misapplied the burden of proof rule.

There is an important difference between the burden of proof and a legal presumption. The latter is merely procedural. Thus, when it is said that there is a presumption that the Commissioner's determination is prima facie correct, the reference is to a legal presumption. Consequently when contrary evidence is placed in the record, the presumption of prima facie correctness is gone completely and the case is wide open. *J. M. Perry & Co. v. Commissioner,* 9 Cir., 1941, 120 F. 2d 123; 9 Mertens, *Law of Federal Income Taxation* 50.71 (1943). Certainly the entire record herein shows clearly that contrary evidence existed. Therefore the only question left for the Tax Court to decide was whether petitioners carried their burden of proof.

The burden of proof is the duty of the person alleging the case to prove it. It never shifts. McKelvey, *Evidence* 94 (5th ed. 1944). In order to carry his burden of proof, a taxpayer must prove his facts before the court by a "preponderance of the evidence," *Schilling Grain Corp.,* 1927, 8 B.T.A. 1048, such as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money, *Burnet v. Niagara Falls Brewing Co.,* 1931, 282 U.S. 648, 51 S.Ct. 262, 75 L.Ed. 594.

However, the Tax Court required much more of these particular petitioners than required by the Supreme Court in the *Burnet* case when the Tax Court held herein:

> ". . . Accordingly, we can not accept the evidence as *conclusively* proving the full amount of the claimed losses . . ." (R. 20). (Emphasis supplied)

Petitioners submit that conclusive proof is not required. Whether there was a preponderance of the evidence such as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money is the proper test. One thing is certain. If conclusive proof is required of taxpayers to carry the burden of proof in civil tax cases, the right of appeal from the Commissioner's determination has a hollow ring to it. Very little, if anything in life, can be proved conclusively. No doubt that is why the Supreme Court of the United States had the following to say regarding the burden of proof:

> "Unquestionably the burden of proof is on the taxpayer to show that the commissioner's determination is invalid. . . Frequently, if not quite generally, evidence adequate to overthrow the commissioner's finding is also sufficient to show the correct amount, if any, that is due. . . But, where as in this case the taxpayer's evidence shows the commissioner's determination to be arbitrary and excessive it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him. . ." *Helvering v. Taylor.* 1935, 293 U. S. 507, 515, 55 S.Ct. 287, 79 L.Ed. 623.

Nevertheless, even if the Tax Court had correctly applied the aforementioned "preponderance of the evidence" rule in determining if petitioners had carried their burden of proof, the pe-

titioners would have prevailed. This is evident from both the quality and quantity of the evidence introduced by petitioners, and the utter lack of any by the Commissioner.

In the first place, the Commissioner's own action in asserting his deficiency notices based solely on the accuracy of petitioners' permanent record (Exhibit 3) constitutes acceptance of the correctness of petitioners' permanent record relating to the business of booking bets. Since the Tax Court found as fact that losing bets were first deducted from winning bets before entries were made in both the "Gain" and "Loss" columns of Exhibit 3 (R. 15), the use of the total of entries in the "Gain" column as the sole basis of the deficiency amounted to acceptance of petitioners' method of recording losses. Surely the Tax Court cannot find, without substantial evidence or even some evidence to support the finding, that petitioners' record (Exhibit 3) is not reliable while at the same time sustaining deficiency notices based solely on the correctness of that same record.

In its opinion, the Tax Court dealt with this point by making two answers. First, it said that petitioners cannot so "complain" since the Commissioner has allowed some losses by virtue of his acceptance of the "Gain" column (R. 20). Petitioners submit that the fact that the Commissioner has allowed losses used in computing the entries under the "Gain" column is not some or any evidence of the unreliability of the entries appearing in the "Loss" column. The second answer was that the gain figures, "in a sense," were admissions against interest and so were more reliable than the "bare 'Loss' figures" (R. 20). To this, petitioners point out to the Court that the phrase "bare 'Loss' figures" is misleading for it suggests that the "Loss" column entries were not computed and recorded in exactly the same manner as the entries made in the "Gain" column. It is because such was the case, and the Tax Court so found (R. 14, 15), that the Commissioner's action constitutes acceptance of both the method used to record losses and the reliability of the permanent record (Exhibit 3). To hold that the "Gain" figures are admissions against interest and therefore more reliable than the "bare 'Loss' figures" does not

supply, from the record, evidence to support a finding that Exhibit 3 was unreliable. It is not upon such threads of sand that findings of fact are tied. Nor does it follow that the Commissioner need not have produced evidence sustaining the unreliability of Exhibit 3. When the legal presumption of correctness attaching to his determination evaporated at the trial, the fact that he accepted the method and accuracy of recording gains and losses, which was the same for both the "Gain" and "Loss" columns, by using those appearing in the "Gain" column as the sole basis of his deficiency notice, made it mandatory for him to introduce evidence to support a finding that the "Loss" column figures were unreliable. If not, the Commissioner can sustain his deficiency notices in the Tax Court, even after his presumption of correctness has disappeared, with no more authority than the careful use of a pair of scissors. Can all entries unfavorable to the Commissioner, which are computed and recorded in the same manner as those favorable to the Commissioner, be placed in an isolation ward called "Unreliable" simply by classifying the entries favorable to the Commissioner as admissions against interest? Furthermore, it is not correct to say that the gain figures are admissions against interest, and therefore more reliable than the loss figures. The reason is that the figures appearing in the "Loss" column are also admissions against interest because total gains from winning bets were subtracted from total losses from losing bets and the difference entered in the "Loss" column. By subtracting these gains from losses, thereby reducing the losses claimed, petitioners made an admission against interest. Therefore, according to the Tax Court's reasoning, the "Loss" figures are just as reliable as the "Gain" figures.

However, testimony regarding the Commissioner's own action was not the only step which the record shows was taken by petitioners to carry their burden of proof. In addition, the uncontradicted testimony of three witnesses, including the taxpayer, affirmed the complete accuracy of petitioners' permanent record (Exhibit 3). To begin with, the testimony of petitioner Jack Showell was not impeached by cross-examination. True, the Tax Court dismissed his testimony insofar as it verified the accuracy of

the figures appearing in the "Loss" column by saying that it was "self-serving" (R. 20). Yet the testimony of this same person served as the sole basis for virtually every finding of fact made by the Tax Court. This raises the question of the respect which such a finding should be accorded by this Court in the light of the entire record. All testimony of all taxpayers is selfserving unless the taxpayer is testifying that the Commissioner's determination is correct. What is significant is whether his testimony was believed or not, and was supported by other evidence. If it is not worthy of belief, a finding to that effect should be made. However, that could not be done by the Tax Court because the taxpayer's forthright testimony was the foundation of practically all of its findings of fact, and the correctness of his own permanent record (Exhibit 3) was the sole basis of the Commissioner's determination. As this Court said in *Grace Bros., Inc. v. Commissioner,* 9 Cir., 1949, 173 F. 2d 170, 174:

> "It is axiomatic that uncontradicted testimony must be followed. Chesapeake and Ohio Railway Company v. Martin, 1931, 283 U. S. 209, 216, 217, 51 S.Ct. 453, 75 L.Ed. 983; San Francisco Association for the Blind v. Industrial Aid for the Blind, 8 Cir., 1946, 152 F. 2d 532, 536; Foran v. Commissioner, 5 Cir., 1948, 165 F. 2d 705. The only exception to the rule occurs when we are dealing with testimony by witnesses who stand impeached and whose testimony is contradicted by the testimony of others or by physical or other facts actually proved or with testimony which is inherently improbable."

Petitioners suggest that the Tax Court cannot lightly sidestep the above rule by simply inserting a sentence in its opinion that the testimony of the taxpayer was "self-serving."

Furthermore, Mr. Showell's testimony respecting the accuracy of Exhibit 3 was corroborated by a responsible former City Manager and City Commissioner of Phoenix, Arizona, named Houston L. Walsh who had no interest in the case (R. 110, 111). Mr. Walsh testified that he helped petitioner keep books and records regarding the latter's betting business (R. 111), and that he actually posted about half of the entries on Exhibit 3 (R. 112). Mr. Walsh stated that first either he or Mr. Showell would call out each of the winning tickets to the other who would add them

on an adding machine (R. 110-115). Then the tickets would be handed to the other person while the person who had previously called them out would take over the adding machine (R. 110-115, 14, 15). The same procedure was used for all losing tickets, and the two men always exchanged places to make sure the totals were correct (R. 114, 115, 14, 15). When the totals of all winning bets and all losing bets were thus doublechecked, the total of losing bets was deducted from the total of winning bets. (R. 110-115, 14, 15). The resulting figure, which was either a net gain or a net loss, was entered in the "Gain" column if a net gain and in the "Loss" column if a net loss (R. 110-115, 14, 15). The entries made in both the "Gain" and "Loss" columns of Exhibit 3 were the result of this procedure, and such was found to be fact by the Tax Court (R. 14, 15). About half of such entries made on Exhibit 3 were made by Mr. Walsh (R. 62, 112).

With respect to the uncontradicted testimony of Mr. Walsh, which was actually strengthened on cross-examination (R. 113, 114), the Tax Court said:

> ". . . Walsh had no first hand knowledge of the accuracy of the figures *read off to him* by the petitioner from his slips." (R. 20). (Emphasis supplied)

Such a statement infers that Mr. Walsh's role was passive in that he too did not call out the winning and losing bets from the individual slips to petitioner. The record (R. 110-115) including the Tax Court's own findings of fact (R. 14, 15) utterly refutes such an inference. Furthermore, it is a convenient way of dismissing any testimony ever offered to corroborate the accuracy of any written record. Only one person could ever have first hand knowledge of the accuracy of the individual slips, and that is the taxpayer whose testimony, but only in particular respects, was ignored by the Tax Court as "self-serving." What this statement says in effect is that some of the individual slips *might* have been inaccurate. It is not a statement that there is evidence in the record to show that Jack Showell kept individual bet slips which were wrong. If what the Tax Court is really saying is that the accuracy of each winning and losing bet slip must be proved before petitioners could carry the burden of proof, it is holding in substance

that every dice table in Las Vegas, Nevada, must keep a record showing the name and address of every bettor, the number of times each placed a bet, the amount of each bet, the number of times the dice were rolled, and the number of times each person won or lost. And, if that were done, would it not then be necessary to offer the sworn testimony of each of these bettors to prove the accuracy of the individual bet slips since the testimony of the proprietor would be self-serving? Possibly Society would be well served by such a requirement since it would be difficult for organized gambling to exist, but is that the criteria applied by the Internal Revenue Code or used in determining whether a burden of proof has been carried?

Nor was the testimony of Mr. Showell and Mr. Walsh the only evidence of the reliability of Exhibit 3. Three cancelled checks were available in support of three expense items found in the "Loss" column. They were Exhibits 4, 5, and 6 (R. 66, 67).

It is not suggested to this Court that any of the above factors, standing alone, should have been accepted by the Tax Court as carrying petitioners' burden of proof. However, a comprehensive view of all of them leaves little doubt that the Tax Court has incorrectly treated the legal presumption of correctness which attaches to the Commissioner's determination as evidence which was used to balance out the cumulative effect of petitioners' evidence. Further, even assuming that it did not treat the legal presumption of correctness as evidence, it misapplied the burden of proof rule.

With respect to certain important facts found by the Tax Court, it is submitted that there is no evidence of any kind to support them. For instance, it was found as fact that the petitioner Jack Showell destroyed the individual slips of paper upon which each bet was noted "in order to maintain secrecy respecting his customers and for the purpose of creating an excuse for not producing them if and when called upon." (R. 14). There is absolutely nothing in the record upon which such a finding can be based. Neither on direct or cross-examination was testimony even remotely to that effect developed (R. 57-110). Instead, petitioner testified, on cross-examination, that he had kept his records for the

betting business in the same fashion for fifteen years (R. 104). If the Tax Court's said finding was based on the assumption that such must have been true because petitioner knew that booking bets on football, baseball and basketball games was illegal in Arizona, it is founded on an erroneous assumption. The reason is that petitioner Jack Showell was a litigant in a case before the Arizona Supreme Court which held that booking bets on horse races did not violate the criminal gaming statute of Arizona. *Engle v. State of Arizona,* 1939, 53 Ariz. 458. There the court emphasized that Arizona law does not prohibit gambling per se. "It is only certain specified forms of gambling that are forbidden, and it is only the keepers of houses where these particular forms are carried on who are punished by the provisions of article 9, *supra.*" *Engle v. State of Arizona,* 1939, 53 Ariz. 458, 470. An examination of the court's opinion reflects that it held that an implement or devise determining who won or lost and which was an integral part of the gambling was necessary before the statute was violated. Since the petitioner, Jack Showell, had been a party to a 1939 suit to determine the extent of Arizona's gaming statutes, he knew that the business of booking bets was not illegal under Arizona's criminal statute.

Next the Tax Court found that:

> "Although petitioner retained the cancelled checks issued by him in 1949 in payment to certain winning bettors, when asked by the revenue agent for the names and addresses of persons to whom he had paid winning bets, and the amount paid to each, the petitioner informed him that he was unable to give him that information." (R. 17).

The record does not show that Mr. Showell was ever asked for cancelled checks. In fact, Mr. Showell testified as follows:

> "Q. Did Revenue Agent, Mr. Mende, ever ask if he could examine any of those checks?
> A. No." (R. 61).

Agent H. L. Mende himself testified as follows with respect to the checks:

> "Q. Did you ask Mr. Showell if you could have any cancelled checks?

A. The cancelled checks would not have any bearing on it.

The Court: Did you ask him or did you not?

A. I do not remember." (R. 50)

However, more important is the fact that the retained cancelled checks to certain bettors actually would not have any bearing on the problem because a check payment had no relation to either wins or losses (R. 74).

In the light of the foregoing arguments, it is respectfully submitted that the Tax Court's decisions are not supported by the evidence, are clearly erroneous, and not in accordance with law because:

(1) It erroneously treated the legal presumption of correctness attaching to the Commissioner's determination as evidence.

(2) It misapplied the burden of proof rule by requiring petitioners to *conclusively* prove their case.

(3) From the entire record, petitioners did carry their burden of proof by a preponderance of the evidence such as would support a verdict for a plaintiff in an ordinary action for the recovery of money.

(4) Its ultimate finding of fact that petitioners realized $19,563.66 of additional income is in conflict with its specific findings of fact and is not supported by substantial evidence.

II

Although the Tax Court's majority opinion decided that the evidence did not "conclusively" prove the full amount of the claimed losses (R. 20) and the dissenting opinion indicated proof was impossible because individual slips were not retained (R. 26), the trial judge, who wrote the dissenting opinion, refused to allow petitioners to introduce material evidence concerning their net worth and disbursements as some proof that additional income was not realized (R. 86). After admitting into evidence, as Exhibit 9, a beginning and ending balance sheet for 1949, and considerable testimony of petitioner Jack Showell concerning the entries therein, the trial judge refused to accept testimony concerning petitioners' disbursements for 1949. Such evidence is, of course, necessary

before a beginning and ending net worth can have any weight or relevance. The trial court was informed by petitioners' counsel before the balance sheet (Exhibit 9) was offered that it was appropriate evidence for the reason that if the Commissioner can prove a deficiency on the basis of the net worth and disbursements method, it followed that a taxpayer could disprove a deficiency by the use of the same method (R. 77). In other words, is the relevance of evidence based on the net worth and disbursements method controlled by whether the Commissioner's deficiency was based on that method, or is it not relevant in a case where the Commissioner is attacking the adequacy and reliability of petitioners' records? Petitioners submit that it was not proper for the Tax Court to sustain the Commissioner because petitioners' record was not reliable and at the same time deny them the opportunity to present this type of evidence as some proof that the Commissioner's determination was incorrect. To say that proof must be limited to the losses themselves is to say that the Tax Court is not interested in whether the petitioners actually realized additional income or not. An appeal to the Tax Court is from a determination that a taxpayer has a deficiency in income taxes. It is not an appeal limited to the narrower question of whether *conclusive* proof can be presented sustaining losses. A taxpayer's income tax liability should not be determined on such a fragmentary basis particularly in a case where it is apparent from the entire record that the Commissioner has not disallowed specific losses at all, but has rejected a portion of petitioners' permanent record as being unreliable. That is why petitioners' counsel stated at the trial that "This is a case where the deficiency between the parties is a matter of the petitioners' records." (R. 38).

In the dissenting opinion, the trial judge said:

> . . . "The impossibility of proving the material facts upon which the claim rests does not relieve the taxpayer of his burden of proof. . ." (R. 26)

What Judge Withey is saying is that if a taxpayer's records do not, in the Tax Court's opinion, which opinion is voiced after the taxable year involved has expired, satisfy Section 54 of the 1939 Internal Revenue Code, there is no possible way of overturning the

Commissioner's determination. Aside from the fact that no case has so interpreted Section 54, petitioners submit that such a view elevates some evidence of a fact (an entry made on a piece of paper) to the status of fact itself. Certainly the Tax Court would not hold that the mere existence of the discarded records would prove the fact of deductions or of income. That is why the Commissioner is entitled to prove a deficiency in income tax via the net worth and disbursements method either where no records exist or where they are unreliable. Such being the case, cannot a taxpayer offer net worth and disbursements evidence as some proof that the Commissioner's determination is erroneous in a case where the Commissioner is attacking the reliability and sufficiency of the taxpayer's records?

Suppose the Commissioner issued a notice of deficiency in the sum of $1,000,000 for the taxable year 1953 to any one of us. In order to carry the burden of proof, the Tax Court would require, as an absolute condition precedent, the existence of written records disproving the deficiency. Furthermore, it would later determine whether such records were adequate under the meaning of Section 54. If it did decide that certain records were lacking under Section 54, it would be impossible for a taxpayer to carry the burden of proof.

If such an approach is approved, the Commissioner will have obtained a new method of reconstructing income which eliminates any need for the use of the net worth and disbursements method, and which is an unbeatable weapon against the taxpayer because no defense is available. After all, when the Commissioner uses the net worth and disbursements method, the taxpayer can at least defend on that theory. Here there is no defense.

Also, such a view actually places a taxpayer who has kept a permanent record in a much less favorable position than one who has not bothered to keep any records. It is difficult to conclude that Section 54 was designed to accomplish such a result.

Consequently, when the Tax Court refused to admit evidence concerning petitioners' disbursements for the year 1949, to supplement evidence concerning beginning and ending net worth which

was offered as some proof that the Commissioner's determination was erroneous, it was in error.

CONCLUSION

The decisions of the Tax Court in the instant cases are erroneous and should be reversed.

Dated: Phoenix, Arizona
October 1, 1955

Respectfully submitted,

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No. 14760

In the United States Court of Appeals for the Ninth Circuit

JACK SHOWELL AND DOROTHY SHOWELL, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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JACK SHOWELL AND DOROTHY SHOWELL, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 11-27) are reported at 23 T. C. 495.

JURISDICTION

The Commissioner determined that there were deficiencies in the individual income taxes of Jack Showell and Dorothy Showell for the year 1949 in the amounts of $3,946.65 and $4,065.69 respectively. Notices of these deficiencies, dated February 26, 1953 (R. 6, 121), were mailed to the taxpayers individually. Individual petitions for redetermination of these deficiencies were filed in the Tax Court by each of the taxpayers, within the permitted 90-day period, on April 30, 1953, under the

provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3, 4-6, 121.) On January 26, 1955, the Tax Court entered decisions that there were deficiencies in the income tax for the year 1949 of Jack Showell and Dorothy Showell in the amounts of $3,286.65 and $3,392.25, respectively. (R. 27-28.) Separate petitions for review by this Court were filed by each of the taxpayers on March 9, 1955. (R. 29, 121.) Accordingly, this Court has jurisdiction of these cases under the provisions of Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court's finding that the taxpayers did not sustain gambling losses in 1949, in the amount claimed by them, is supported by the evidence.

2. Whether the Tax Court abused its discretion in refusing to admit into evidence certain testimony, relating to the expenditures of the taxpayers during the taxable year, which was objected to as being irrelevant and immaterial to the question of whether the taxpayers sustained gambling losses in that year.

STATEMENT

The facts, as found by the Tax Court, are as follows:

The taxpayers, husband and wife, filed individual income tax returns for the year 1949 with the Collector of Internal Revenue for the District of Arizona. Interest income, rental income and income from a partnership were reported on these returns; no income was reported from or loss was deducted with respect to wagering operations. (R. 12.)

During 1949, the taxpayer, Jack Showell, was engaged in booking bets on baseball, football and basketball games. About 90 per cent of the bets taken by

Showell was made over the telephone and no receipts or tickets were given for the money wagered. Most of the bettors were known to Showell and credit was extended by him, in some instances, to persons who he thought were good risks; other bettors were required to pay him the amount of their bets prior to his acceptance of the bet. He received both cash and checks in payment of the bets. (R. 12.)

Bets were accepted by Showell on either of the two teams participating in a baseball, basketball or football game at odds of six to five. A bettor was required to put up six dollars to win five dollars. "Point spreads" were used to attempt to place both teams on an equal basis for betting purposes. If an equal amount of money was bet on each of the teams in a particular game, Showell would lose one bet of five dollars and win one bet of six dollars, realizing one dollar profit for each twelve dollars bet on the game. The element of risk for Showell increased when more money was bet on one team than on the other. (R. 13.)

Showell made notations of each bet on a small slip of paper or on a sheet called a "tally sheet," which was used for persons making several bets. (R. 13-14.) Initials were used to identify the bettors, from which only Showell could determine who the bettors were. (R. 14.) After a game had been played, Showell marked each of the slips and tally sheets with an "X" to indicate losing bets, and a circle to indicate winning bets. At the end of the day or week, depending on which type of game was involved, the slips and tally sheets would be totaled to determine whether the day's or week's activities resulted in a net gain or net loss to Showell. Showell generally followed the procedure of reading separately the results of all of the winning

bets and all of the losing bets to one Houston L. Walsh, a man who shared Showell's office. Walsh added them on an adding machine. The total of the winning bets was set off against the total of the losing bets and a net gain or loss was determined. A similar procedure was followed with Walsh reading from the slips and sheets and Showell using the adding machine. (R. 14.) The results thus obtained were entered on a sheet of columnar paper, entitled "Sports—1949," which was submitted in evidence as Exhibit 3. (R. 14-15, 44.) If amounts received from losing bettors exceeded amounts paid to winning bettors, the amount of the excess was entered opposite the date under the column headed "Gain." If the converse was true, the amount of the excess of losses was entered under a column entitled "Loss." (R. 15.) This was the only record of bookmaking losses retained by Showell; sometime after the day's results were entered and all claims had been cleared the slips and tally sheets were destroyed by Showell. (R. 14, 16.) Showell also kept sheets showing the amounts of bets owed to him by bettors, which, at the end of the year, were added to ascertain the total amounts owed him. (R. 16.)

Six amounts reflecting items other than gains or losses were shown on Exhibit 3. Four of these were as follows: $125 for rent; $59.40 representing payment to Western Union for services; $60 for payment to Athletic Publications, Inc., an information service on football teams; and $100.82 for telephone service. Items of $2,447.50 and $1,350, entered on December 31, represented amounts which Showell determined to be owed to him by bettors. These amounts were placed in the "Loss" column of Exhibit 3. (R. 16-17.) The exhibit,

with these amounts entered as losses, reflected a net loss for the year in the amount of $581.09. (R. 15-16.)

The income tax returns of the taxpayers for the year 1949 were investigated by a revenue agent who was furnished the data shown on "Sports—1949." The agent was unable to obtain from Showell any data or records which would enable him to verify any of the amounts shown on the summary sheet. He was advised by Showell that he had no other books or records with respect to the bookmaking transactions. Although Showell retained cancelled checks issued by him in payment to certain winning bettors, he informed the agent, who had requested the names and addresses of persons to whom he had paid winning bets and the amounts of such bets, that he was unable to furnish that information. The checks were not shown to the agent or any representative of the Commissioner prior to the hearing in the Tax Court. (R. 17-18.)

The Commissioner determined that Showell had income of $22,908.88 (the amount shown in the "Gain" column of "Sports—1949") from wagering operations and allowed as deductions the amounts of the four expense items referred to above. One-half of the net gain thus computed was determined to be taxable to each of the taxpayers, and the deficiencies were thus determined. (R. 18.)

The Tax Court found that Showell sustained gambling losses of $3,000 in addition to those allowed by the Commissioner. (R. 18.)

SUMMARY OF ARGUMENT

The basic issue presented to the Tax Court was whether the taxpayers' record of bookmaking activities, entitled "Sports—1949," accurately listed amounts as

net losses incurred on wagers on listed days. This factual issue turned on the question of the credibility of the record and of testimony by Jack Showell, one of the taxpayers, to the effect that the record accurately contained the results of bookmaking transactions. The Tax Court was correct in treating this case, and similar cases, as turning primarily on their individual facts. And since the evidence fully supported the Tax Court's findings herein, the decision of the Tax Court should be affirmed.

No error was committed by the trial judge in the Tax Court in excluding from evidence testimony of Jack Showell relating to his expenditures for the taxable year. Such evidence was irrelevant and immaterial since it was far too remote from the basic issue of whether losses were sustained. The remoteness of the type of evidence offered, the apparent deficiencies in the net worth method, the burden placed on the Commissioner, and the possibility that the trial might be unnecessarily prolonged if such evidence were admitted, when coupled with the fact that the evidence offered would stand in no better light than Jack Showell's testimony that the summary sheet accurately reflected his income from bookmaking, make it obvious that the trial judge exercised his sound discretion in ruling that the evidence was inadmissible.

ARGUMENT

I

The Decision of the Tax Court that the Taxpayers Did Not Sustain Wagering Losses in Amounts Claimed by Them Is Amply Supported by the Evidence and Should be Affirmed

As in most cases, the broad issue presented to the Tax Court in the instant case was whether the taxpayers

realized income in excess of that reported on their income tax returns. The Commissioner had determined that the taxpayers had received income from bookmaking activities in the amount of $22,563.66, which was not reported on their return. This determination was made by utilizing the taxpayers' only record of bookmaking activities, a summary sheet entitled Sports —1949, which was introduced into evidence as Exhibit 3. (Appendix, *infra;* R. 44.) This record consisted of columns headed "Gain" and "Loss," in which, opposite listed dates, various amounts purporting to represent the net results of bookmaking activities on the date listed, were set forth. The Commissioner, in determining the deficiencies asserted, accepted as true all of the amounts listed, and, except in minor respects,[1] disallowed all of the net losses appearing on the summary sheet for lack of substantiating evidence.

The taxpayers did not dispute the accuracy of the "Gain" amounts shown on the summary sheet, but contended that the Commissioner's disallowance of the "Loss" items similarly appearing on the sheet was erroneous. The basic issue presented to the Tax Court, then, was whether the summary sheet accurately recorded the results of the taxpayers' bookmaking activities for the year 1949.

The Tax Court, reviewing the Commissioner's determination, also accepted the amounts set forth on the

[1] Four items appearing in the "Loss" column were accepted by the Commissioner. These appeared on December 1, December 14 and December 22, and represented amounts paid for rent, to Western Union, to Athletic Publications, Inc., an odds-furnishing service, and for telephone expense. The taxpayers had cancelled checks showing payment of all of the above amounts except the amount stated for rent. (R. 65, 66, 67.) None of these items are now in dispute.

summary sheet as "Gain," but did not give credence to the amounts contained in the "Loss" column. However, the Tax Court, with two judges dissenting,[2] found that the taxpayers did sustain some losses in addition to those reflected in the net amounts of gains and, apparently on the theory of *Cohan* v. *Commissioner,* 39 F. 2d 540 (C. A. 2d), found such losses to be in the amount of $3,000. It is submitted that the Tax Court's decision was correct and should be affirmed.

The Tax Court has consistently treated this type of case as presenting solely factual issues and decided each case on the basis of facts adduced therein.[3] That this is the proper treatment is manifest when it is considered that the issue presented is essentially one in which credibility is the deciding factor. If the Tax Court chose to believe that the taxpayers' record of gambling activities, the summary sheet, was an honest and faithful record of those activities, the issue would have been resolved in the taxpayers' favor. On the other hand, in a case such as the instant one, where the Tax Court is not of that mind, the losses appearing on the summary sheet are properly disallowed. It is precisely in this type of situation that the Tax Court's find-

[2] The dissenting judges thought that no additional losses should have been allowed to the taxpayers, since they failed to keep the records required of them by the Internal Revenue Code.

[3] The Tax Court's consistent method in deciding similar cases on the basis of facts presented in each is illustrated by the following cases which reach varying results: *Rainwater* v. *Commissioner*, 23 T.C. 450; *Nemmo* v. *Commissioner*, 24 T.C. No. 67; *Nellis* v. *Commissioner,* decided February 28, 1955 (1955 P-H T.C. Memorandum Decisions Service, par. 55,050); *Robert Fogel* v. *Commissioner*, decided June 30, 1955 (1955 P-H T.C. Memorandum Decisions Service, par. 55,185); *Max Fogel* v. *Commissioner*, decided June 30, 1955 (1955 P-H T.C. Memorandum Decisions Service, par. 55,186); and *Clark* v. *Commissioner*, decided September 7, 1955 (1955 P-H T.C. Memorandum Decisions Service, par. 55,252).

ings should remain undisturbed unless clear error appears. *United States* v. *Gypsum Co.*, 333 U. S. 364, rehearing denied, 333 U. S. 869; *Ward* v. *Commissioner*, 224 F. 2d 547 (C. A. 9th). And we submit that no such error exists, in the instant case, but rather that the findings of the Tax Court are amply supported by the evidence.

The chief witness presented by the taxpayers in the Tax Court was Jack Showell, one of the taxpayers. He gave testimony relating to the general manner in which his bookmaking business was conducted, which was not challenged in any manner by the Commissioner; this testimony also formed the basis for many of the findings of fact made by the Tax Court. In addition, Mr. Showell's testimony concerned the manner in which the summary sheet entitled "Sports—1949" (Exhibit 3) was prepared and its accuracy. It was this testimony which was challenged by the Commissioner on cross-examination and was rejected by the Tax Court as self-serving. (R. 20.) There can be no doubt on reading Mr. Showell's testimony relating to these matters that the Tax Court was plainly justified in not choosing to believe that the summary sheet was accurate.

Mr. Showell testified, on cross-examination, that although he had checks and check stubs showing amounts paid to bettors, he had never made them available to the examining revenue agent (R. 87-89, 97-98) although the agent had requested Showell to turn over to him any proof substantiating the claim that the losses had been incurred (R. 55-56). Moreover, Mr. Showell testified that he never furnished any of the names and addresses of bettors on whose bets he had incurred losses to the revenue agent, although such names were requested, presumably because the agent had asked for *all* of the

names of such persons and Showell would have only been able to furnish some names. (R. 89.) This, of course, made it impossible for the agent to check, to any extent, the accuracy of the statements appearing on the summary sheet.[4] Certainly these factors, coupled with the fact that Mr. Showell was, to say the least, a highly interested witness, are sufficient reason for the Tax Court to refuse to believe his testimony on this crucial issue.

Three other witnesses, H. L. Mende, Huston L. Walsh and C. E. Leech, appeared on behalf of the taxpayers. Mr. Mende, a revenue agent, testified concerning the manner in which the deficiencies were determined. His testimony, in no way, attempts to prove the existence of the losses.

Mr. Walsh testified (R. 110-115) that he assisted Showell in totaling the results of the betting during the year 1949. His testimony was confusing[5] and taken most favorably to the taxpayers tends to prove only that there were slips showing each bet which were used in preparing the summary sheet. However, he did not prepare these slips and could not, in any way, vouch for their accuracy.

Mr. Leech testified (R. 115-116) that at the end of 1949 he owed Showell about $1,350 as a result of bets which he lost. This testimony corroborated an amount

[4] The Tax Court might also have wondered about the apparent inconsistency between Mr. Showell's testimony that he took bets on basketball games (R. 59, 60, 91, 100), and his testimony that he did not take bets between January and September (R. 91) apparently to corroborate the lack of any gains or losses on Exhibit 3 for that period, while the basketball season extends through February.

[5] The transcript does not make it clear whether Mr. Walsh actually saw the figures on each of the betting slips. (See R. 111, 112, 114, 115.)

shown on an adding machine tape appended to the summary sheet. Since, however, the Tax Court found that the taxpayers sustained additional losses of $3,000, it must be assumed that this testimony was taken into account in making that finding.

The taxpayers complain (Br. 8) that the Tax Court could not accept the amounts shown on the summary sheet as "Gains" while at the same time refuse to accept the accuracy of the amounts shown as "Losses" since some losses went into the computation of the "Gains." The Tax Court, however, was clearly justified in believing that the amounts shown as gains were at least accurate to the extent admitted by the taxpayers. As the Tax Court said (R. 20):

> These gain figures, in a sense, were admissions against interest by the petitioners and so were more reliable than the bare "Loss" figures carried in the other monthly columns on the exhibit.

It must be remembered that the taxpayers were under an obligation pursuant to Section 54 of the Internal Revenue Code of 1939 to maintain books and records. The purpose of this code provision is apparent; there must be some records available which will enable the Commissioner to determine whether income has been properly reported. Here, the "record" kept by Jack Showell is really no better than a mere statement on a return that a taxpayer realized income in a specified amount. For this reason, it has been held that a taxpayer has the burden of proving his right to take deductions and their amount. *Burnet* v. *Houston*, 283 U. S. 223. In a case such as this, the Commissioner is placed in a difficult position where he has really no means available for substantiating the existence of the

taxpayers' losses. Cf. *Burka* v. *Commissioner,* 179 F. 2d 483 (C. A. 4th). We submit that the Tax Court in treating each individual case presenting this kind of problem as a factual issue is adopting the only reasonable course open to it. And, in refusing to accept the self-serving testimony presented herein to prove the losses claimed, the Tax Court was properly exercising its prerogative as a trier of fact. Cf. *Chesbro* v. *Commissioner* (C. A. 2d), decided August 9, 1955 (1955 C. C. H., par. 9602).

II

The Tax Court's Refusal to Admit Certain Evidence Relating to the Expenditures of the Taxpayers Was a Reasonable Exercise of Its Discretion to Exclude Irrelevant and Immaterial Evidence.

The taxpayers complain that the refusal of Judge Withey, who presided at the trial below, to admit testimony relating to their net worth and expenditures as some evidence of the incorrectness of the Commissioner's determination is reversible error. (Br. 14-17.) The Commissioner's objection to the line of testimony being adduced by the taxpayers was that such testimony was immaterial and irrelevant. (R. 85-86.) We submit that the trial judge's action in sustaining this objection was a proper exercise of his discretion.

In reviewing questions relating to the propriety of the admission or exclusion of evidence, objected to on the grounds of relevancy and materiality, the appellate court should not inquire as to whether it, in the position of the trial judge, would have admitted or excluded the proffered evidence. Rather, the issue is whether there was a clear abuse of the discretion vested in the trial judge in ruling on such questions. II Wigmore, Evidence, Section 444; American Law Institute, Model

Code of Evidence, Rule 303; *Atlantic Coast Line R. Co.* v. *Pidd,* 197 F. 2d 153 (C. A. 5th), certiorari denied, 344 U. S. 874; *Newman* v. *Clayton F. Summy Co.,* 133 F. 2d 465 (C. A. 2d). It can readily be seen that there was no such abuse in the instant case.

The use of the net worth method for determining income has been upheld in criminal tax cases (*Holland* v. *United States,* 348 U. S. 121) as well as civil tax cases (*Lipsitz* v. *Commissioner,* 21 T. C. 917, affirmed, 220 F. 2d 871 (C. A. 4th), certiorari denied October 10, 1955). However, it has been made clear that many problems arise in the use of that method by the Government and that care must be taken to insure that the rights of the taxpayers are not jeopardized. *Holland* v. *United States, supra.* This should be no less true when its use is attempted by a taxpayer in a civil case to overcome his burden of proof.

Traditionally, it is within the Commissioner's power to determine the correct method for the computation of income, and it must be remembered that the Commissioner in instances where he resorts to the net worth method is, in a sense, compelled to do so by the taxpayer's failure to keep records which are accurate or verifiable. Its use should be sparingly allowed to taxpayers who place themselves in a position, as did the taxpayers herein, where it is impossible to provide the Commissioner or the Tax Court with any means of substantiating a wholly inadequate record.

Moreover, the accurate proof of income by such circumstantial evidence very often results in long, complicated, burdensome and confusing trials. In a situation where the taxpayer seeks to introduce this kind of evidence into a trial, it is properly within the discretion of a trial judge to weigh the possibility of such an un-

desirable result against the effect of exclusion of the submitted evidence. And in cases such as the instant one where the Commissioner's agents may not have conducted their investigations with a view toward ascertaining the net worth and expenditures of the taxpayers, the Commissioner, at the trial, may be placed in the position of being unable, because of lack of information, to question the taxpayers' computations. An almost insuperable burden would be placed on the Commissioner if, in each investigation or audit of a taxpayer's returns, it were necessary to conduct a net worth and expenditure investigation in order to prepare for the possible use of that method by the taxpayer in the event of litigation.

Finally, the nature of the excluded evidence clearly shows that its exclusion resulted in no real prejudice to the taxpayers' case. There were introduced into evidence comparative balance sheets of Jack Showell as of December 31 of the years 1947, 1948 and 1949. (R. 76.) No offer of evidence, either documentary or testimonial, was made to explain or substantiate the amounts appearing on the exhibit, except testimony of Mr. Showell. After he had testified concerning the amounts shown on the exhibit, he was questioned about automobile expenses, and expenses for a maid. (R. 85.) He was then asked about the cost of buying food for his family; at this point the Commissioner objected (R. 85-86) and the objection was sustained (R. 86). This was the only evidence offered that was excluded. Since no other offer of proof was made, it must fairly be assumed that any additional evidence of expenditures would also have been elicited from Mr. Showell. The evidence excluded was self-serving and was intended to corroborate other self-serving testimony of Mr.

Showell about the accuracy of his summary sheet. Certainly, this additional testimony of Mr. Showell is subject to the same disabilities that were inherent in his other testimony. The trial judge could, therefore, reasonably exclude such testimony since it added nothing whatever to the case. If the Tax Court chose not to believe Mr. Showell's testimony about Exhibit 3, his attempt to corroborate his previous testimony, by additional testimony in a different vein, would stand in the same light. It was, therefore, not reversible error for Judge Withey to exclude the evidence proffered but rather was a reasonable exercise of his discretion.

CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted,

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NOVEMBER, 1955.

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C.D [illegible]

LEECH 1[illegible]

RCA 1[illegible]

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No. 14,760

IN THE

United States Court of Appeals

For the Ninth Circuit

JACK SHOWELL AND DOROTHY SHOWELL,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONERS

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Respondent.

REPLY BRIEF FOR PETITIONERS

PRELIMINARY STATEMENT

The most significant aspect of respondent's brief is its complete silence with respect to several basic points submitted in petitioners' opening brief. For instance, on page 7 of petitioners' opening brief, the contention was advanced that the Tax Court misinterpreted the burden of proof rule when it required petitioners to produce *conclusive* proof of losses instead of a preponderance of the evidence such as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money. Respondent's brief does not even dispute the point.

Also, no answer was made to the statement, on pages 12 and 13 of petitioners' brief, that the record was utterly devoid of any evidence to support the Tax Court's findings that petitioner Jack Showell destroyed the individual slips of paper upon which each bet was noted "in order to maintain secrecy respecting his customers and for the purpose of creating an excuse for not producing them if and when called upon."

Nor does respondent reply to the contention, on page 8 of petitioners' opening brief, that the Tax Court cannot find, without substantial evidence or even some evidence to support the finding, that petitioners' record (Exhibit 3) is not reliable while at the same time sustaining deficiency notices based solely on the correctness of that same record (Exhibit 3).

Insofar as respondent's statement of the facts are concerned, certain objections must be registered. First, on page 3 of its brief at the bottom of the page, respondent said:

> "Showell *generally* followed the procedure of reading separately the results of all the winning bets and all of the losing bets to one Houston L. Walsh, a man who shared Showell's office." (Emphasis supplied)

The insertion of the word "generally" is not supported by either the Tax Court's findings of fact or the record. The Tax Court made no reservation when it found that petitioner read to Houston L. Walsh the amounts of all winning and losing bets. Indeed the testimony of Mr. Showell and Mr. Walsh was that the same procedure was *always* used. Petitioners point out this fact because the use of the word "generally" leaves the inference that Mr. Walsh did not always participate in the procedure by which each day's or week's bets were computed and recorded. This is important because Mr. Walsh's testimony that he *always* exchanged places with Mr. Showell and read off the winning and losing tickets to Mr. Showell is vital corroborative testimony that all of Exhibit 3 is accurate (R. 113-115).

Issue is likewise taken with the statement of fact, on page 5 of respondent's brief, that:

"Although Showell retained cancelled checks issued by him in payment to certain winning bettors, he informed the agent, who had requested the names and addresses of persons to whom he had paid winning bets and the amounts of such bets, that he was unable to furnish that information."

Respondent cites the Tax Court's findings of fact as authority, but this begs the question. On page 13 of petitioners' opening brief, issue was taken with such a finding as not being supported by the evidence. In reference to the checks and the names of bettors, Mr. Showell testified as follows on cross-examination:

"Q. Were any of the names you mentioned here, the payees as mentioned, did you disclose any of those names to the Government representative?

A. No.

Q. Why were they not?

A. When Mr. Mende was there, all he asked for was if I could give him all the names, addresses and amount of *every* bet that I paid out and I said that would be impossible and that is as far as it went." (R. 89) (Emphasis Supplied)

With respect to respondent's Summary of Argument, note is taken of its statement that:

"The basic issue presented to the Tax Court was whether the taxpayer's record of bookmaking activities, entitled 'Sports — 1949', accurately listed amounts as net losses incurred on wagers on listed days."

Petitioners submit that the basic issue was whether the taxpayers carried their burden of proof in showing that they did not realize additional income during 1949 as alleged by the deficiency notices. Thus, when respondent's brief says:

"This factual issue turned on the credibility of the record and the testimony by Jack Showell, one of the taxpayers, to the effect that the record accurately contained the results of bookmaking transactions."

it cannot be acquiesced in by petitioners.

ARGUMENT

I

Petitioners agree with respondent's statement, on page 7 of its brief, that the broad issue presented to the Tax Court was whether they realized income exceeding that reported on their returns. However, serious disagreement arises when it is stated by respondent that the determination that petitioners received additional income of $22,563.66 "was made by *utilizing* the taxpayers' only record of bookmaking activities, a summary sheet entitled Sports—1949, which was introduced into evidence as Exhibit 3". "Utilizing" is not the proper word at all. The testimony of the examining revenue agent, H. L. Mende, and the entire record clearly show that Exhibit 3 was the *sole* source and basis of the determination (Pet. Br. 2).

Likewise petitioners cannot agree with respondent's phrase, also on page 7 of its brief, that:

> "The taxpayers did not dispute the accuracy of the 'Gain' amounts shown on the summary sheet, . . . "

Of course the petitioners did not dispute the accuracy of the "Gain" amounts. It was their position that the entire record (Exhibit 3) was accurate, and that the Commissioner could not pick and choose only those entries which were favorable to him while ignoring those entries favorable to the taxpayer unless the evidence showed the unreliability of the entries rejected. To say that the taxpayers did not dispute the accuracy of the "Gain" amounts is no more than an attempt to convince the Court that it was the petitioners who were adopting certain entries when convenient and ignoring others when it was to their advantage. Such was not the case, and the entire record proves that petitioners have always urged that all of Exhibit 3 was correct.

Respondent states, on page 8, that the Tax Court did not give credence to the amounts appearing in the "Loss" column because it did not *believe* that Exhibit 3 was an "honest and faithful record." Petitioners are unable to discover such a statement, direct

or indirect, in the Tax Court's opinion. Nowhere in the opinion is a finding found that Exhibit 3 was not honest and accurate. Indeed such a conclusion would have been impossible to make because the Commissioner's deficiency rested solely on the accuracy of amounts appearing in the "Gain" column of Exhibit 3.

Nor is there agreement with the conclusion, also on page 8, that the Tax Court found that petitioners did sustain some losses in addition to those reflected in the net amounts of gains and,

> "*apparently* on the theory of *Cohan* v. *Commissioner,* 39 F. 2d 540 (C.A. 2d), found such losses to be in the amount of $3,000." (Emphasis supplied)

The word "apparently" cannot avoid the fact that the Tax Court opinion never mentioned *Cohan* v. *Commissioner.* Petitioners submit that defenses on appeal which are based on what the Tax Court "apparently" did should not be seriously considered, but should be evaluated as being indicative of an extremely weak case. Petitioners could not allege as error what the Tax Court "apparently" did. Consequently, defenses should likewise be restricted to reality and conjecture ignored.

On page 9, respondent argues that the Tax Court's findings are *amply* supported by the evidence. This does not answer petitioners' citation, on page 5 of their opening brief, that:

> "A finding of fact is clearly erroneous when, even though there is evidence to support it, the appellate court 'on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *Gillette's Estate* v. *Commissioner,* 9 Cir. 1950, 182 F. 2d 1010, 1014."

It is also questionable whether respondent's argument that the Tax Court's findings are "amply supported by the evidence" responds to another citation on pages 5 and 6 of petitioners' opening brief that:

> "Should the Tax Court decision lack *substantial* evidence to support it, it will be considered as clearly erroneous and not supported by the evidence. *Wright-Bernet, Inc.* v. *Commissioner,* 6 Cir., 1949, 172 F.2d 343."

If respondent is using the word "amply" to refer to quantity rather than quality, it is no answer. On the other hand, if "amply" is used as a synonym with "substantial", it becomes relevant to examine what is alleged to be the "ample" evidence that supports the Tax Court's decision.

Respondent's list begins on page 9 of its brief at the second paragraph. First, it is said that Mr. Showell's testimony concerning the manner in which Exhibit 3 was prepared and its accuracy was challenged by the Commissioner on cross-examination and rejected by the Tax Court as self-serving. To begin with, Mr. Showell's testimony on cross-examination with respect to the manner of preparation and accuracy of Exhibit 3 was not challenged. Instead, his testimony was strengthened. Furthermore, how could the Commissioner have challenged the manner of preparation and accuracy of Exhibit 3 when he was relying on the accuracy of the "Gain" column therein as the sole basis of his deficiencies? In addition, what is the signficance of an argument that a taxpayer's testimony was challenged by the Commissioner on cross-examination? It usually is. The question is whether it was believed, and the Tax Court made no finding in that regard, and for good reason. Virtually all of the Tax Court's findings of fact are based on Mr. Showell's testimony including all of the findings of fact concerning Exhibit 3, except the ultimate finding concerning the "Loss" column. Respondent cannot escape from this fact by its attempt to create a distinction between the testimony Mr. Showell gave concerning the "general manner in which his bookmaking business was conducted" and "the manner in which the summary sheet entitled 'Sports—1949' (Exhibit 3) was prepared and its accuracy." (Res. Br. 9). The distinction does not exist in fact, and if it did, it would be impossible of detection.

Next, respondent cites, on pages 9 and 10, as substantial evidence supporting the Tax Court's findings, that although Mr. Showell had checks showing amounts paid to bettors he did not make them available to the revenue agent who requested Mr. Showell to turn over to him "any proof substantiating the claim

that the losses had been incurred." The pages of the record cited by respondent (R. 55, 56) reflect that Mr. Mende asked Mr. Showell for detailed records on the daily and weekly totals, but was not asking for or interested in the checks because as Mr. Mende himself testified:

> "The cancelled checks would not have any bearing on it." (R. 50).

The reason, of course, was that retained cancelled checks to certain bettors were not relevant because a check payment to a bettor had no relation to the amount the individual either won or lost because as Mr. Showell testified:

> ". . . some of these people put up their money to start with. I may have given them a check and still show a loss. The check may have been less than they sent in, that is, the amount of the checks." (R. 74, 75).

But, more important, what is the relevance between the production of these cancelled checks, which were never asked for (R. 50, 61), and respondent's contention that the Tax Court's findings are supported by substantial evidence? Petitioners submit that there is none.

Next, and in the same paragraph, respondent says:

> "Moreover, Mr. Showell testified that he never furnished any of the names and addresses of bettors on whose bets he had incurred losses to the revenue agent, although such names were requested, *presumably* because the agent had asked for all of the names of such persons and Showell would have only been able to furnish some names." (Emphasis supplied)

To be accurate Mr. Showell was not asked to produce just the names. As he testified:

> "A. When Mr. Mende was there, all he asked for was if I could give him *all* the *names, addresses* and *amount of every bet* that I paid out and I said that would be impossible and that is as far as it went." (R. 89) (Emphasis supplied)

Because the cancelled checks had no relationship to losing bets, date of bet, or total amount of bets won or lost, it was impossible

for him to give Mr. Mende the information the latter sought. Furthermore, does the fact that this material could not be obtained offer substantial evidence to support the Tax Court's findings? Respondent argues that it does because without all of the names, addresses, and amounts of every bet, the Commissioner could not check the accuracy of the statements appearing on Exhibit 3. But what does such an argument say except that it was impossible for petitioners to carry their burden of proof as to Exhibit 3 even though the Commissioner's deficiencies were based on it. The problem before the Tax Court was whether petitioners carried their burden of proof in court, and was not whether the revenue agent's request for all of the names, addresses, and amounts should have been interpreted by Mr. Showell to mean just some of the names, addresses and amounts, whatever good that would have done.

To say that the above factors, coupled with the fact that Mr. Showell was a "highly interested witness" (Res. Br. 10), are sufficient reason for the Tax Court to refuse to believe his testimony "on this crucial issue" is not relevant. What crucial issue? Also, where did the Tax Court state that it did not believe Mr. Showell? It merely classified his testimony as "self-serving", the sufficiency of which petitioners challenged on pages 9 and 10 of their opening brief, and which cannot be successfully avoided by exchanging the words "highly interested" for "self-serving". Petitioners submit that respondent's argument does not offer substantial evidence to support the Tax Court's finding.

Furthermore, the accuracy of Exhibit 3 cannot be challenged by arguments tucked away in footnotes of respondent's brief such as the following on page 10:

> "The Tax Court *might* also have wondered about the *apparent* inconsistency between Mr. Showell's testimony that he took bets on basketball games (R. 59, 60, 91, 100), and his testimony that he did not take bets between January and September (R. 91) *apparently* to corroborate the lack of any gains or losses on Exhibit 3 for that period, while the basketball season extends through February." (Emphasis supplied)

This is a remarkable argument. It is based on an assumption that the Tax Court "might" have wondered. It is not based on anything in the record. It is based on an "apparent" inconsistency, and attempts to infer that Mr. Showell testified he took bets on all basketball games. It is based on an assumption that the Tax Court "might" have wondered about an "apparent inconsistency" arising from testimony "apparently" given to corroborate no entries for January to February. About the only fact in the footnote is that the basketball season extends through February, and even that is not in the record. Unquestionably the trial court itself would not consider so many consecutive non-sequitors. Their presence in a brief to this Court can only indicate that grasping for straws was essential.

As further support for the conclusion that the Tax Court's findings are based on substantial evidence, it was said, on page 10, with respect to the corroborative testimony of Houston L. Walsh that:

> "His testimony was confusing[5] and taken most favorably to the taxpayers tends to prove only that there were slips showing each bet which were used in preparing the summary sheet."

The authority for the statement that Mr. Walsh's testimony was confusing is another footnote argument which states:

> "[5] The transcript does not make it clear whether Mr. Walsh actually saw the figures on each of the betting slips."

This is a strange footnote to use as support of the statement that Mr. Walsh's testimony was confusing in view of respondent's own statement of the facts on page 4 of its brief that:

> "A similar procedure was followed with Walsh reading from the slips and sheets and Showell using the adding machine."

Also, the Tax Court so found (R. 14), and the testimony shows that Mr. Walsh and Mr. Showell *always* exchanged places so that Mr. Walsh too *always* read from the slips and sheets to Mr. Showell who added the amounts on an adding machine (R. 110-115, 14, 15). Thus, it is quite clear that Mr. Walsh actually saw the figures on the slips, and that respondent does not seriously

offer the point in view of its own statement of the facts.

When respondent says that Mr. Walsh's testimony only proves there were slips for each bet, but that he could not vouch for their accuracy, it is simply repeating the Tax Court's statement which was questioned on pages 11 and 12 of petitioners' opening brief. However, the repetition of the statement does not offer any answer. Consequently, petitioners urge that no substantial evidence to support the Tax Court's findings has been presented by the Walsh contentions.

Following the Walsh contentions, respondent "disposes" of Mr. Leech's corroborative testimony that at the end of 1949 he owed Showell $1,350 by saying:

> "Since, however, the Tax Court found that the taxpayers sustained additional losses of $3,000, *it must be assumed* that this testimony was taken into account in making that finding." (Emphasis supplied)

Why must it be assumed? The Tax Court opinion does not even contain Mr. Leech's name in it. What is the logical relationship between a round sum of $3,000 and $1,350 which requires the adoption of an "assumption" that the former comprehended the latter, particularly when the opinion is devoid of any explanation of how the $3,000 was obtained and on what basis? Why should arguments on appeal which are based on assumptions be considered? Nevertheless, even if the assumption were a sound one, the argument does not offer content to the requirement that the Tax Court's findings be supported by substantial evidence. Is the fact of $1,350 owed to Mr. Showell by Mr. Leech substantial evidence warranting a conclusion by the Tax Court that the "Loss" column figures were unreliable, or is it not substantial evidence, along with the rest of the record, that they *are* reliable?

Next, on page 11, respondent reiterates the Tax Court's reason for acceptance of the "Gain" column figures while rejecting all of the "Loss" column figures on the ground that the former are admissions against interest. This statement does not respond to the contentions made on pages 8 and 9 of petitioners' opening brief

that the phrase "bare 'Loss' figures" was misleading, and that the substance is unsound for the reasons set forth therein. Also, the statement does not supply from the record evidence to support a finding that the "Loss" column figures were unreliable. Therefore, it is submitted that this reason offered by respondent is also deficient in supplying the substantial evidence necessary to support the Tax Court's findings.

Lastly, respondent restates the reasons given by the dissenting judges which were questioned on pages 15 and 16 of petitioners' opening brief. No response to the arguments therein advanced by petitioners is offered. To say that the taxpayer has the burden of proving his deductions is a legal truism in federal income tax law. Stating it in a brief does not supply an answer to the question of whether he carried his burden of proof. Criticism is made of Exhibit 3 as not being sufficient under Section 54 of the Internal Revenue Code of 1939, even though Exhibit 3 was the basis of the Commissioner's deficiencies. But certainly a failure to comply with the requirements of Section 54 does not impose the penalty on a taxpayer of paying a tax on gross income if independent proof is available particularly in a case where the Commissioner has assessed a deficiency based on that same record. Furthermore, it is no answer to petitioners' contentions to say that each case must be decided on the facts. Petitioners do not dispute this. Nobody would. The problem is whether the Tax Court's finding of fact regarding the "Loss" column entries is supported by substantial evidence or even any evidence. So far, it is respectfully suggested that respondent has not offered either substantial evidence or any evidence. The issue is not determined by the last sentence, on page 12 of respondent's brief, that the Tax Court's refusal to accept self-serving testimony was a proper exercise of its prerogative as a trier of fact. There is a great deal more evidence in this record than the testimony of Mr. Showell, assuming that characterizing testimony as "self-serving" is sufficient to avoid the rule set forth in *Grace Bros., Inc.* v. *Commissioner,* 9 Cir., 1949, 173 F.2d 170, 174 quoted on page 10 of petitioners' opening brief.

Petitioners submit that respondent's arguments under I are insufficient.

II

The refusal of the trial judge to receive evidence of disbursements as a necessary part of the testimony relating to petitioners' net worth and disbursements as some proof that additional income was not realized was defended on the ground that this was a reasonable exercise of his discretion. Respondent says there must be a clear abuse of his discretion in ruling on such questions, and cites II Wigmore, Evidence, Section 444; American Law Institute, Model Code of Evidence, Rule 303, along with two cases.

Turning to the cited portion of Wigmore, it is noted that Section 444 refers to the discretion of the trial judge when dealing with proof concerning Tendency, Capacity, Quality, Cause, or Effect. The scope of the subject, says Wigmore, deals with inferences from specific instances of observed effects, exhibitions, or illustrations, to the supposed tendency, capaciy, or quality of producing them. II Wigmore, Evidence, Section 441 at 423. An example given is where the issue is whether the vibrations of factory-machinery have caused a conceded injury in an adjacent house. The main controversy is whether the former is the cause of the latter; but, in searching among the probable causes, the argument is obviously confined to those things which have a tendency or capacity to product such effects, and thus the real proposition of the proponent becomes this: namely, that the factory-apparatus has a tendency or capacity to produce such effects. Petitioners fail to observe the relevance of this type question to net worth and disbursements evidence that income has or has not been realized. Petitioners' counsel doubts that respondent would like the reverse side of the coin if the courts applied the rules of evidence concerning Tendency, Capacity, Quality, Cause, or Effect to net worth cases brought by the Government.

As far as Rule 303 of the Model Code is concerned, and assuming its applicability, it falls within Chapter IV dealing with

admissability as affected by considerations of extrinsic policy, and under Subtitle B entitled Evidence of Comparatively Slight Probative Value. It states that a judge may exclude otherwise admissable evidence if he finds that its probative value is outweighed by the risk that its admission will (a) necessitate undue consumption of time, (b) create substantial danger of undue prejudice or of confusing the issues or misleading the jury, or (c) unfairly surprise a party who had no reasonable ground to anticipate that such evidence would be offered. Petitioners urge that, in view of the majority opinion that *conclusive* proof was necessary and the trial judge's statement indicating proof was impossible, the additional time required to cover Mr. Showell's disbursements would not require an undue consumption of time or create a substantial danger of undue prejudice or confuse the issues or unfairly surprise the defendant to whom a net worth statement was submitted (R. 75). This is especially so after the trial judge admitted all of the net worth testimony.

The two cited cases are equally remote. In *Atlantic Coast Line R. Co.* v. *Pidd,* 197 F.2d 153 (C.A. 5th), certiorari denied, 344 U.S. 874, it was held that in an action against a railroad for damages sustained in a crossing collision between a train and car, evidence *tending* to show speed of train just prior to collision is admissable if not too *remote* in time or distance to be relative, and the admissability is largely in the discretion of the trial court. In *Newman* v. *Clayton F. Summy Co.,* 133 F.2d 465 (C.A. 2nd) it was held that in an action against a music publisher for negligence in failing to return a manuscript submitted to it, the exclusion of testimony of royalties received by the composer from another publisher which also published the composer's reconstructed manuscript on loss of the original was within trial court's discretion in view of the *remoteness* of the testimony.

On page 13 it is argued that the Government's use of the net worth method should be restricted to protect the rights of taxpayers, and that this should be no less true when its use is attempted by a taxpayer to overcome his burden of proof. Petitioners

fail to discern how the rights of the taxpayers are being protected by denying them the use of net worth evidence before a court which is requiring *conclusive* proof and a trial judge whose opinion indicated clearly that the absence of individual bet slips made it impossible to carry their burden of proof, particularly when the court sustained a deficiency based solely on the taxpayer's record (Exhibit 3) while at the same time designating the same record as unreliable.

Next, on page 13 of its brief, respondent contends, as a premise, that:

> "*Traditionally,* it is within the Commissioner's power to determine the correct method for the computation of income . . ." (Emphasis supplied)

and, as a conclusion, that its use should be "sparingly allowed" to taxpayers who have "a *wholly* inadequate record." First, tradition has absolutely nothing to do with the power which the Commissioner does or does not have. His right to use the net worth method is restricted by the language of Section 41 of the Internal Revenue Code of 1939 as interpreted by the Courts. The Commissioner of Internal Revenue has no power founded on tradition. He is an agent of Congress and not of the culture. Also, petitioners ask the Court to note how the respondent constantly refers to Exhibit 3 as "a *wholly* inadequate record" for purposes of denying them the use of net worth and disbursement evidence, but admits that the accuracy of the figures appearing in the "Gain" column of Exhibit 3 were the source of the deficiency notices. When the phrase "*should* be sparingly allowed" is observed, it becomes clear that the contention is a policy argument not based on legal authority, and which does not respond to petitioners' contentions set forth on pages 14 through 17 of their opening brief.

On pages 13 and 14 respondent pleads that the disbursements evidence should have been kept out because the trial might become confusing, burdensome, and long, and the burden on the Commissioner would be "almost insuperable". Petitioners submit that the Commissioner and the Tax Court cannot have it both ways. If

they are going to sustain deficiencies based on the accuracy of Exhibit 3 while denying defenses based on the accuracy of the same piece of paper, petitioners should not be denied the opportunity to disprove the deficiency by other proof. Respondent's agent had seen Mr. Showell's balance sheet, which went into evidence as Exhibit 9 without objection (R. 76). It is difficult to see how respondent would have an insuperable burden when the taxpayers are assigned the burden of proof. Furthermore, the Tax Court itself has permitted the use of net worth and disbursements evidence by a taxpayer against the Government. In *Domenic de Franco,* P-H 1950 T.C. Mem. Dec. Par. 50,311 (1950), the taxpayer offered net worth and disbursements evidence to overcome the Commissioner's determination which was based on gross bank deposits, and in fact the determination based on the net worth and disbursement method was accepted.

Finally respondent says that exclusion of the evidence did not really prejudice petitioners because it was based on Mr. Showell's testimony which was self-serving. If this is the test of admissability of evidence in an income tax case, petitioners suggest that there is not a taxpayer alive who would be able to carry his burden of proof. What is the legal authority for this convenient method of disregarding a portion of a witness' testimony? Petitioners renew the points urged on pages 9 and 10 of the opening brief in this regard. Also, how can respondent conclude it may be disregarded because the Tax Court did not believe his previous testimony? The opinion does not so state nor could it in view of the findings of fact virtually all of which were founded on his testimony.

CONCLUSION

The decisions of the Tax Court should be reversed.

Respectfully submitted,

W. Lee McLane, Jr.
Nola McLane
Counsel for Petitioners

November, 1955

No. 14,760

IN THE

United States Court of Appeals

For the Ninth Circuit

JACK SHOWELL AND DOROTHY SHOWELL,
Petitioners,

VS

COMMISSIONER OF INTERNAL REVENUE
Respondent.

PETITION FOR REHEARING EN BANC

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vs

COMMISSIONER OF INTERNAL REVENUE
Respondent.

PETITION FOR REHEARING EN BANC

To the United States Court of Appeals for the Ninth Circuit:

Petitioners respectfully petition for a rehearing *en banc* and as their reasons therefore assign the following:

I

A serious difference as to the relief to be accorded petitioners is reflected by the two opinions written by Judges Chambers and Pope, respectively.

II

The rule of law set forth in the Tax Court's opinion that conclusive proof is required before a taxpayer has carried his burden of proof can be said to be affirmed by the majority opinion herein. It is true that the paragraph beginning at the bottom of page 8 of the opinion of Judge Chambers indicates otherwise. However, the language on page 7 which supports the opinion of Judge Withey refutes such a conclusion being drawn from the paragraph at page 8 because Judge Withey's opinion required conclusive proof since it showed clearly his position that it was impossible for the petitioners to carry their burden of proof.

In view of the statement by respondent's counsel at the trial that this was "somewhat of a test case," (R. 39) petitioners submit that the Tax Court consciously required "conclusive proof" rather than proof of the facts by a "preponderance of the evidence," *Schilling Grain Corp.,* 1927, 8 B.T.A. 1048, such as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money, *Burnet v. Niagara Falls Brewing Co.,* 1931, 282 U.S. 648, 51 S. Ct. 262, 75 L. Ed. 594. Thus, it was no accident that the facts were written as they were, and it may be argued that the majority opinion herein does not reverse the Tax Court on this rule of law requiring conclusive proof.

III

The Tax Court specifically found as fact the exact manner in which Exhibit 3 was made. Therefore, it found that the losses and gains incurred daily were recorded on that exhibit. Such a finding requires the conclusion that the losses should have been allowed. The decision of the Tax Court that the losses were less is contrary to its own findings of fact and should be reversed with directions to enter judgment for petitioners. This is particularly true since the record is completely lacking in evidence that the method of recording gains and losses was inaccurate or that there were inaccuracies in the exhibit, and since there is no finding of fact that the losses did not occur. After all, it was the Tax Court

itself which made the following findings under the designation "Findings of Fact":

> "After a game had been played, the petitioner examined the slips of paper and tally sheets for winners and losers. He marked winning bets with a circle and entered the amount to be paid to the bettor. He marked losing bets with an 'X'. At the end of the day, if a baseball or basketball game was involved, or at the end of the week if a football game was involved, the petitioner would read to Houston L. Walsh, who shared an office with the petitioner, the amounts entered on the slips of paper and the tally sheets to be paid to winning bettors and Walsh added them on an adding machine. A similar procedure was followed for determining the amount of the losing bets. When the totals of both were obtained, a similar procedure was followed with Walsh reading to petitioner from the slips of paper and tally sheets and petitioner operating the adding machine. After the foregoing procedures had been gone through, *entries,* as follows, *were made on a sheet of columnar paper,* entitled 'SPORTS — 1949' and *submitted in evidence as* petitioner's *Exhibit 3.* If the total of the amounts of the bets by losing bettors exceeded the total of the amounts to be paid to winning bettors, the amount of the excess was entered on Exhibit 3 in a column under the heading 'Gain.' If the total of the amounts to be paid winning bettors exceeded the total of the amounts of the bets by losing bettors, the excess was entered on Exhibit 3 in column under the heading 'Loss.' *The entries made on Exhibit 3 from January 1 to December 7, 1949, were made by Walsh. The other entries made on the exhibit were by the petitioner.*
> "Petitioner's Exhibit 3 shows the following:" (Emphasis supplied)

IV

The fair import of the majority opinion is that the Tax Court will be sustained if it finds that the testimony of both petitioner and Walsh was unsatisfactory, on the theory that the left hand figures (Gain) are admissions against interest. It is very respectfully submitted that the evidentiary concept of "admissions against interest" does not apply to one-half of a document any more than it applies to one-half of a statement. As best stated in 1 Jones On Evidence 553, 554 (4th ed. 1938):

> "Where one party offers the books or a statement of account furnished by the other party, for the purpose of showing admissions, it has frequently been held that he renders admissable those items which are favorable as well as those which are adverse to such other party. The one offering such an account as an admission cannot have the benefit of the credits *without also submitting to the debits.*" (Emphasis supplied).

If this Court sustains the Tax Court on the principle that only one-half of a document or permanent record constitutes an admission against interest, there is not a set of books and records in the United States which will not support a deficiency in tax impossible of refutation. Surely there must be some evidence offered by the Commissioner that the loss column is inaccurate. If not, then a taxpayer is required to carry the burden of proof by conclusive proof.

CONCLUSION

For the reasons set forth above, petitioners respectfully submit that their petition for a rehearing *en banc* should be granted and that the judgment of the Tax Court should be reversed and the case remanded with directions to enter judgment for petitioners.

Respectfully submitted,
W. LEE MCLANE, JR.
NOLA NCLANE

Dated November 6, 1956 *Counsel for Petitioners*

CERTIFICATE OF COUNSEL

W. LEE MCLANE, JR. and NOLA MCLANE certify hereby that they are counsel for the petitioners herein; that they make this certificate in compliance with rule 23 of this Court; that in their judgment this petition for rehearing is well founded and is not interposed for delay; that copies of this petition have been duly served by petitioners upon counsel for the respendent.

W. LEE MCLANE, JR.
NOEA MCLANE

Dated November 6, 1956

No. 14770

United States Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC., a Corporation, PETER A. BANCROFT and VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,

Appellees.

and

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C. FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

Transcript of Record

In Two Volumes

FILED
OCT 11 1955
PAUL P. O'BRIEN, CLERK

Volume I
(Pages 1 to 506)

Appeals from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-9-55

No. 14770

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC., a Corporation, PETER A. BANCROFT and VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,

Appellees.

and

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C. FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

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In the United States District Court in and for the Southern District of California, Central Division

No. 14309

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC., a Corporation; PETER A. BANCROFT, VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY AND SEABOARD SURETY COMPANY, A Corporation,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF AND BREACH CONTRACT

Comes now the plaintiff, United States of America, and for its cause of action against the above-named defendants, complains and alleges as follows:

I.

This action arises under the Constitution and laws of the United States of America, and in particular under the provisions of the Surplus Property Act of 1944, 58 Stat. c. 479, 50 U.S.C. App. 1611 et seq., as implemented by War Assets Administration Regulation 4, 11 F.R. 5868, Title 32 C.F.R. 1946 Supp. sec. 8304.1 et seq., and under the provisions of

the Federal Property and Administrative Services Act of 1949, 63 Stat. c. 288. 40 U.S.C. 471 et seq. This Court has jurisdiction of this action under the provisions of Title 28, United States Code, Section 1345, and has jurisdiction to grant the declaratory relief asked under the provisions of Title 28, United States Code, Section 2201.

II.

Plaintiff is informed and believes, and upon such information and [2*] belief, alleges that the defendants, Charles C. Finn and George C. Finn, hereinafter sometimes referred to as the "defendants Finn," reside in or about the County of Los Angeles, California, and during all the pertinent times referred to herein, the defendants Finn were engaged in doing business for gain and profit as dealers in used or second hand property, including aircraft and aircraft parts, in or about the County of Los Angeles, California, and other places throughout the United States.

III.

At all times herein, the defendant, International Airports, Inc., was and now is a corporation duly organized and existing under the laws of the State of California.

IV.

Plaintiff is informed and believes, and upon such information and belief alleges the defendant Peter A. Bancroft resides in or about the City of Bakersfield, Kern County, State of California, and

*Page numbering appearing at foot of page of original Certified Transcript of Record.

said defendant is, and during all the pertinent times hereinafter referred to was, the superintendent of the Vineland Elementary School District near the said City of Bakersfield.

V.

The defendant, Vineland Elementary School District, Kern County, State of California, is, and during all the pertinent times hereinafter referred to was, a public educational system or organization, and is and was a political subdivision and public corporation of the State of California, created and organized for public educational purposes.

VI.

The defendant, Seaboard Surety Company, is a corporation duly organized and existing under the laws of the State of New York.

VII.

Plaintiff is now, and during all the pertinent times hereinafter referred to was, the owner and is now entitled to the immediate possession of a certain C-46A Curtiss-Commando airplane bearing United States Army serial number 42-3645. The said airplane will hereinafter sometimes be referred to for convenience as "the C-46A airplane." [3]

VIII.

Pursuant to the Surplus Property Act of 1944, 58 Stat, C. 479, 50 U.S.C. App. 1611 et seq., and the policies and regulations promulgated thereunder,

and on or about June 25, 1946, plaintiff, United States of America, entered into a written agreement with defendant, Vineland School District. A full, true and correct copy of this agreement is attached hereto marked "Exhibit A" and made a part of this complaint.

IX.

On or about July 25, 1946, plaintiff transferred to the defendant, Vineland Elementary School District, under the Surplus Property Act of 1944, War Assets Administration Regulation 4, and upon and subject to the terms and conditions set forth in the agreement referred to in paragraph VIII hereof, the possession of the C-46A airplane.

X.

Plaintiff is informed and believes, and upon such information and belief alleges the C-46A airplane is, and during all the pertinent times hereinafter referred to was, fit for use by a tax-supported educational institution for non-flight instructional purposes and is not now, and has never been, scrap and has never been rendered unfit and useless except for its basic material content.

XI.

On or about February 28, 1951, the defendant, Vineland Elementary School District, acting by and through the defendant, Peter A. Bancroft, asserting that it was the owner of the full legal and beneficial title of the C-46A airplane, in violation of its

agreement with plaintiff, "Exhibit A" hereto, and in defiance of the plaintiff's right, title and interest in and to the C-46A airplane, purported to sell the C-46A airplane to the defendants Finn.

Plaintiff is informed and believes, and upon such information and belief alleges the defendant, Vineland Elementary School District now claims that said purported sale to the defendants Finn is null and void and that the defendant, Vineland Elementary School District, is the owner and entitled to the possession of the C-46A airplane as against the plaintiff and all the world. [4]

XII.

On or about February 28, 1951, the defendants Finn, without right and without the consent of the plaintiff, wrongfully took possession of the C-46A airplane and have ever since and do now detain possession thereof against the will and without the consent of plaintiff. Plaintiff is informed and believes, and upon such information and belief alleges the defendants Finn claim that by virtue of the purported sale of the C-46A airplane to them by the defendant, Vineland Elementary School District, they are the owners and entitled to the possession thereof.

XIII.

Plaintiff is informed and believes, and upon such information and belief alleges on or about August 31, 1951, the defendant, International Airports, Inc., without right and without the consent of the plaintiff wrongfully took possession of the

C-46A airplane and have ever since and do now detain possession thereof against the will and without the consent of plaintiff. Plaintiff is further informed and believes, and upon such information and belief alleges the defendant, International Airports, Inc., claims that by virtue of a certain chattel mortgage and a certain lease both executed by the defendants Finn on or about August 31, 1951, it has an interest in the C-46A airplane as chattel mortgagee and lessee and is entitled to the possession thereof.

XIV.

Plaintiff is informed and believes, and upon such information and belief alleges the defendant Seaboard Surety Company claims an interest in the C-46A airplane by virtue of a bill of sale executed by the defendants Finn on a date unknown to plaintiffs.

XV.

The defendants and each of them claims an interest or interests in the C-46A airplane adverse to the plaintiff. None of said claims has any legal validity whatsoever and actual controversies exist with respect to the C-46A airplane between the plaintiff and the defendants and each of them. [5]

Comes Now the Plaintiff, and for Its Second Cause of Action Complains and Alleges as Follows:

I.

Plaintiff repeats each and every allegation contained in paragraphs I, II, IV, V, VIII and IX

of the First Cause of Action of this complaint with the same force and effect as though they were fully set forth herein.

II.

Plaintiff is informed and believes, and upon such information and belief alleges during all the pertinent times hereinafter referred to, the value of the C-46A airplane was and it now is the sum of seventy thousand ($70,000.00) dollars and the reasonable value of its use was and it now is eight thousand ($8,000.00) dollars per month.

III.

On or about February 28, 1951, defendant Vineland Elementary School District in violation and breach of the said agreement with plaintiff, and the provisions of the statute and regulations authorizing the same, purported to sell and transfer to the defendants Finn the full legal and beneficial title to the C-46A airplane and delivered to them the possession of said airplane.

IV.

Plaintiff is informed and believes, and upon such information and belief alleges the C-46A airplane was never at any time up to and including the time of its purported sale and delivery to the defendants Finn as hereinbefore alleged unfit for use by an educational institution or instrumentality for the purpose of nonflight instruction nor was it prior to such sale or delivery rendered completely

unfit and useless except for its basic material content, and the defendant, Vineland Elementary School District, did not sell or purport to sell the C-46A airplane to the defendants Finn as scrap, but on the contrary, purported to sell and did deliver the same to said defendants in the condition of an assembled airplane which could be and soon thereafter was rendered flightworthy.

V.

By reason of the violation and breach by defendant, Vineland Elementary School District, of its agreement with plaintiff as hereinbefore alleged, plaintiff [6] has been damaged in the sum of seventy thousand ($70,000.00) dollars for loss of the value of the C-46A airplane and in the sun of one hundred and twenty-eight thousand ($128,000.00) dollars for the loss of the reasonable value of the use of said airplane from the time when said agreement was so violated and breached until the commencement of this action.

Comes Now the Plaintiff, and for Its Third Cause of Action Complains and Alleges as Follows:

I.

Plaintiff repeats each and every allegation contained in paragraphs I, II, IV, V, VIII and IX of the First Cause of Action, and paragraphs II, III, and IV of the Second Cause of Action of this complaint with the same force and effect as though they were fully set forth herein.

II.

At and prior to the time of the purported sale and delivery of the C-46A airplane by defendant, Vineland Elementary School District, to defendants Finn as hereinbefore alleged, defendant Peter A. Bancroft and defendants Finn had full knowledge of the terms and conditions of the agreement entered into between plaintiff and defendant Vineland Elementary School District on or about June 26, 1946, and of the provisions of the statutes and regulations authorizing said agreement and had full knowledge that the defendant, Vineland Elementary School District, had obtained and then held possession of the C-46A airplane upon and subject to all of the terms and conditions thereof.

III.

Defendant Peter A. Bancroft and defendants Finn, having the knowledge alleged in the next preceding paragraph hereof, and without justification therefor, nevertheless wilfully, intentionally and actively solicited, persuaded, induced and caused the defendant, Vineland Elementary School District, to violate and breach its said agreement with plaintiff by purporting to sell and by delivering to defendants Finn the C-46A airplane in the condition and under all of the circumstances hereinbefore alleged in reference to said purported sale and delivery [7]

IV.

By reason of the course of conduct of defendant Peter A. Bancroft and defendants Finn in inducing defendant Vineland Elementary School District to

breach and violate its agreement with plaintiff, plaintiff has been damaged in the sum of seventy thousand ($70,000.00) dollars for the loss of the value of the C-46A airplane and in the sum of one hundred twenty-eight thousand ($128,000.00) dollars for the loss of the reasonable value of the use thereof from the time when said agreement was so violated and breached until the commencement of this action.

Wherefore, plaintiff, United States of America, demands judgement as follows:

1. That plaintiff is owner of the C-46A airplane, free and clear of any and all claims or demands of any kind or nature by the defendant herein or any of them;

2. That plaintiff is entitled to the immediate possession of the C-46A airplane, free and clear of any and all claims or demands of any kind or nature by the defendants herein or any of them;

3. Against the defendant Vineland Elementary School District for breach of its agreement with plaintiff in the sum of seventy thousand ($70,000.00) dollars for the loss of the value of the C-46A airplane and one hundred and twenty-eight thousand ($128,000.00) dollars for the loss of the reasonable value of the use thereof;

4. Against the defendants, Finn, and defendant Peter A. Bancroft for Inducing the defendant Vineland Elementary School District to breach its agreement with the plaintiff in the sum of seventy

thousand ($70,000.00) dollars for the loss of the value of the C-46A airplane and one hundred and twenty-eight thousand ($128,000.00) dollars for the loss of the reasonable value of the use thereof;

5. That the defendants pay the plaintiff the costs of this action;

6. For such other and further relief as to the Court may seem just and proper.

WALTER S. BINNS,
United states Attorney;

CLYDE C. DOWNING,
Assistant U.S. Attorney
Chief, Civil Division;

/s/ LEILA F. BULGRIN,
Assistant U.S. Attorney, Attorneys for Plaintiff;
United States of America. [8]

EXHIBIT A

WAA FORM 65

War Assets Administration
Office of Aircraft Disposal
Educational Aircraft Disposal Division
Washington 25, D. C.

No. 1 Date 6-25, 1946

Agreement

In consideration of the transfer of certain items of Aeronautical Property, under provisions of Surplus Property Act of 1944, Public Law 457.

Vineland Elementary School District

located at Rt. 6, Box 207, Bakersfield, Calif., hereby certifies and agrees as follows:

1. That said institution is an "educational institution" as defined in Paragraph 8304.1 of Surplus Property Administration Regulation No. 4 which reads as follows: " 'Educational institution or instrumentality' means any school, school system, library, college, university, or other similar institution, organization, or association, which is organized for the primary purpose of carrying on instruction or research in the public interest, and which is a nonprofit institution or an instrumentality." "Nonprofit institution" means any nonprofit scientific, literary, educational, public-health, public-welfare, charitable, or eleemosynary institution, organization, or association, or any nonprofit hospital or similar institution, organization, or association, which has

been held exempt from taxation under section 101(6) of the Internal Revenue Code, or any nonprofit volunteer fire company or cooperative hospital or similar institution which has been held exempt from taxation under section 101(8) of the Internal Revenue Code.

2. That the property to be acquired hereunder is for the sole use of a (check one) ☒ Tax-supported or Nonprofit institution for one of the following nonflight purposes: (check one) ☒ Instruction ☐ Research ☐ Experiment.

3. That War Assets Administration is authorized to ship to said educational institution all Aeronautical Property transferred to it under the provisions of said Act.

4. That War Assets Administration is hereby relieved of any responsibility or charges that may arise or be incurred incident to shipment or delivery of any property so transferred.

5. Any forms to be submitted upon receipt of property will be executed and [9] returned to the address indicated thereon within forty-eight (48) hours after receipt of the property transferred.

6. That the acquired property will not be used for any actual flight purposes.

7. That all acquired property when unfit for the above purpose will be sold only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material con-

tent. Sales consummated within three (3) years of the date of acquisition must have the prior approval of the Disposal Agency.

8. That this Agreement shall be effective for all future transfers of Aeronautical Property under the provisions of Surplus Property Administration Regulation No. 4, as amended from time to time.

VINELAND ELEM. SCHOOL DIST.
(Institution or Constituted Authority in Charge.)

By DIST. SUPERINTENDENT
(Title.)

(Over)

The information requested below is to assist War Assets Administration in expediting shipments to your institution or to acquire desired information with a minimum of delay.

The following person is authorized to take all steps to facilitate the desired transfers:

1. Peter A. Bancroft,
Title: Dist. Supt.

2. Home address: 509 N. Louise St., Glendale, Calif.

3 Business phone: Residence phone: Glendale Citrus 1-4861

4. Remarks (including person available during vacation periods): Same as Above.

VINELAND SCHOOL
DISTRICT,

PETER A. BANCROFT,

By SEC. BOARD OF TRUSTEES.

State of California
County of Los Angeles—ss.

On this 27th day of June, 1946, in the city of Los Angeles, State of California, personally appeared before me Peter A. Bancroft, who being first duly sworn says that he is the Sec. of Board of Trustees of the Vineland School District, and that he is legally authorized to sign said Agreement for said school or institution; that the above Agreement has been approved by the proper officials of said institution or constituted authority, and that he signed said Agreement in my presence on the day stated above, as and for the official act of said school or institution.

[Seal] C. H. MANN,
Notary Public in and for the
State of California.

My Commission Expires April 4, 1948.

Two copies must be notarized and returned to the Educational Aircraft Disposal Division, Office of

Aircraft Disposal, War Assets Administration, Washington 25, D. C.

U. S. Government Printing Office 16-47804-1

[Endorsed]: Filed July 3, 1952.

Amended September 16, 1952. [11]

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR DECLARATORY RELIEF, BREACH OF CONTRACT AND CLAIM AND DELIVERY

Comes Now the plaintiff, United States of America, and amends its Complaint filed herein as follows:

I.

This action arises under the Constitution and laws of the United States of America, and in particular under the provisions of the Surplus Property Act of 1944, 58 Stat. c. 479, 50 U.S.C. App. 1611 et seq., as implemented by War Assets Administration Regulation 4, 11 F.R. 5868, Title 32 C.F.R. 1946 Supp. sec. 8304.1 et seq., and under the provisions of the Federal Property and Administrative Services Act of 1949, 63 Stat. c. 288, 40 U.S.C. 471 et seq. This Court has jurisdiction of this action under the provisions of Title 28, United States Code, Section 1345 and has jurisdiction to grant the declaratory relief asked under the provisions of Title 28, United States Code, Section 2201.

II.

Plaintiff is informed and believes, and upon such information and [12] belief, alleges that the defendants, Charles C. Finn and George C. Finn, hereinafter sometimes referred to as the "defendants Finn," reside in or about the County of Los Angeles, California, and during all the pertinent times referred to herein, the defendants Finn were engaged in doing business for gain and profit as dealers in used or second hand property, including aircraft and aircraft parts, in or about the County of Los Angeles, California, and other places throughout the United States.

III.

At all times mentioned herein, the defendant, International Airports, Inc., was and now is a corporation duly organized and existing under the laws of the State of California.

IV.

Plaintiff is informed and believes, and upon such information and belief alleges the defendant Peter A. Bancroft resides in or about the City of Bakersfield, Kern County, State of California, and said defendant is, and during all the pertinent times hereinafter referred to was, the superintendent of the Vineland Elementary School District near the said City of Bakersfield.

V.

The defendant, Vineland Elementary School District, Kern County, State of California, is, and during all the pertinent times hereinafter referred to

was, a public educational system or organization, and is and was a political subdivision and public corporation of the State of California, created and organized for public educational purposes.

VI.

The defendant, Seaboard Surety Company, is a corporation duly organized and existing under the laws of the State of New York.

VII.

Plaintiff is now, and during all the pertinent times hereinafter referred to was, the owner and is now entitled to the immediate possession of a certain C-46A Curtiss-Commando airplane bearing United States Army serial number 42-3645. The said airplane will hereinafter sometimes be referred to for convenience as "the C-46A airplane." [13]

VIII.

Pursuant to the Surplus Property Act of 1944, 58 Stat. c. 479, 50 U.S.C. App. 1611 et seq., and the policies and regulations promulgated thereunder, and on or about June 25, 1946, plaintiff, United States of America, entered into a written agreement with defendant, Vineland School District. A full, true and correct copy of this agreement is attached hereto marked "Exhibit A" and made a part of this complaint.

IX.

On or about July 25, 1946, plaintiff transferred to the defendant, Vineland Elementary School District,

under the Surplus Property Act of 1944, War Assets Administration Regulation 4 and upon and subject to the terms and conditions set forth in the agreement referred to in paragraph VIII hereof, the possession of the C-46A airplane.

X.

Plaintiff is informed and believes, and upon such information and belief alleges the C-46A airplane is, and during all the pertinent times hereinafter referred to was, fit for use by a tax-supported educational institution for nonflight instructional purposes and is not now, and has never been, scrap and has never been rendered unfit and useless except for its basic material content.

XI.

On or about February 28, 1951, the defendant, Vineland Elementary School District, acting by and through the defendant, Peter A. Bancroft, asserting that it was the owner of the full legal and beneficial title of the C-46A airplane, in violation of its agreement with plaintiff, "Exhibit A" hereto, and in defiance of the plaintiff's right, title and interest in and to the C-46A airplane, purported to sell the C-46A airplane to the defendants Finn.

Plaintiff is informed and believes, and upon such information and belief alleges the defendant, Vineland Elementary School District, now claims that said purported sale to the defendants Finn is null and void and that the defendant, Vineland Elementary School District, is the owner and entitled to the

possession of the C-46A airplane as against the plaintiff and all the world. [14]

XII.

On or about February 28, 1951, the defendants Finn, without right and without the consent of the plaintiff, wrongfully took possession of the C-46A airplane and have ever since and do now detain possession thereof against the will and without the consent of plaintiff. Plaintiff is informed and believes, and upon such information and belief alleges the defendants Finn claim that by virtue of the purported sale of the C-46A airplane to them by the defendant, Vineland Elementary School District, they are the owners and entitled to the possession thereof.

XIII.

Plaintiff is informed and believes, and upon such information and belief alleges on or about August 31, 1951, the defendant, International Airports, Inc., without right and without the consent of the plaintiff wrongfully took possession of the C-46A airplane and have ever since and do now detain possession thereof against the will and without the consent of plaintiff. Plaintiff is further informed and believes, and upon such information and belief alleges the defendant, International Airports, Inc., claims that by virtue of a certain chattel mortgage and a certain lease both executed by the defendants Finn on or about August 31, 1951, it has an interest in the C-46A airplane as chattel mortgagee and lessee and is entitled to the possession thereof.

XIV.

Plaintiff is informed and believes, and upon such information and belief alleges the defendant Seaboard Surety Company claims an interest in the C-46A airplane by virtue of a bill of sale executed by the defendants Finn on a date unknown to plaintiffs.

XV.

The defendants and each of them claims an interest or interests in the C-46A airplane adverse to the plaintiff. None of said claims has any legal validity whatsoever, and actual controversies exist with respect to the C-46A airplane between the plaintiff and the defendants and each of them. [15.]

Comes Now the Plaintiff, and for Its Second Cause of Action Complains and Alleges as Follows:

I.

Plaintiff repeats each and every allegation contained in paragraphs I, II, IV, V, VIII and IX of the First Cause of Action of this complaint with the same force and effect as though they were fully set forth herein.

II.

Plaintiff is informed and believes, and upon such information and belief alleges during all the pertinent times hereinafter referred to, the value of the C-46A airplane was and it now is the sum of seventy thousand ($70,000.00) dollars and the reasonable value of its use was and it now is eight thousand ($8,000.00) dollars per month.

III.

On or about February 28, 1951, defendant Vineland Elementary School District in violation and breach of the said agreement with plaintiff, and the provisions of the statute and regulations authorizing the same, purported to sell and transfer to the defendants Finn the full legal and beneficial title to the C-46A airplane and delivered to them the possession of said airplane.

IV.

Plaintiff is informed and believes, and upon such information and belief alleges the C-46A airplane was never at any time up to and including the time of its purported sale and delivery to the defendants Finn as hereinbefore alleged unfit for use by an educational institution of instrumentality for the purpose of nonflight instruction nor was it prior to such sale or delivery rendered completely unfit and useless except for its basic material content, and the defendant, Vineland Elementary School District, did not sell or purport to sell the C-46A airplane to the defendants Finn as scrap, but on the contrary, purported to sell and did deliver the same to said defendants in the condition of an assembled airplane which could be and soon thereafter was rendered flightworthy.

V.

By reason of the violation and breach by defendant, Vineland Elementary [16] School District, of its agreement with plaintiff as hereinbefore alleged, plaintiff has been damaged in the sum of seventy

thousand ($70,000.00) dollars for loss of the value of the C-46A airplane and in the sum of one hundred and twenty-eight thousand ($128,000.00) dollars for the loss of the reasonable value of the use of said airplane from the time when said agreement was so violated and breached until the commencement of this action.

Comes Now the Plaintiff, and for Its Third Cause of Action Complains and Alleges as Follows:

I.

Plaintiff repeats each and every allegation contained in paragraphs I, II, IV, V, VIII and IX of the First Cause of Action, and paragraphs II, III and IV of the Second Cause of Action of this complaint with the same force and effect as though they were fully set forth herein.

II.

At and prior to the time of the purported sale and delivery of the C-46A airplane by defendant, Vineland Elementary School District, to defendants Finn as hereinbefore alleged, defendant Peter A. Bancroft and defendants Finn had full knowledge of the terms and conditions of the agreement entered into between plaintiff and defendant Vineland Elementary School District on or about June 26, 1946, and of the provisions of the statutes and regulations authorizing said agreement and had full knowledge that the defendant, Vineland Elementary School District, had obtained and then held possession of the C-46A airplane upon and subject to all of the terms and conditions thereof.

III.

Defendant Peter A. Bancroft and defendants Finn, having the knowledge alleged in the next preceding paragraph hereof, and without justification therefor, nevertheless wilfully, intentionally and actively solicited, persuaded, induced and caused the defendant, Vineland Elementary School District, to violate and breach its said agreement with plaintiff by purporting to sell and by delivering to defendants Finn the C-46A airplane in the condition and under all of the circumstances hereinbefore alleged in reference to said purported sale and delivery. [17]

IV.

By reason of the course of conduct of defendant Peter A. Bancroft and defendants Finn in inducing defendant Vineland Elementary School District to breach and violate its agreement with plaintiff, plaintiff has been damaged in the sum of seventy thousand ($70,000.00) dollars for the loan of the value of C-46A airplane and in the sum of one hundred twenty-eight thousand ($128,000.00) dollars for the loss of the reasonable value of the use thereof from the time when said agreement was so violated and breached until the commencement of this action.

Comes Now the Plaintiff, and for Its Fourth Cause of Action Complains and Alleges as Follows:

I.

Plaintiff repeats each and every allegation contained in paragraphs I, II, III and VII of the First Cause of Action, and paragraph II of the Second

Cause of Action, with the same force and effect as though they were fully set forth herein.

II.

On or about February 28, 1951, the defendants Finn, without right and without the consent of the plaintiff, wrongfully took possession of the C-46A airplane and have ever since and do now detain possession thereof against the will and without the consent of plaintiff and that on some date subsequent to February 28, 1951, defendant International Airport Corporation likewise wrongfully took possession of the C-46A airplane and has ever since said date and does now detain possession thereof against the will and without the consent of plaintiff. Plaintiff has made demands upon the defendants Finn and defendant International Airport Corporation for the possession of the C-46A airplane but these defendants and each of them has refused to comply with the said demands and to surrender the possession of the C-46A airplane to plaintiff.

Wherefore, plaintiff, United States of America, demands judgment as follows:

1. That plaintiff is owner of the C-46A airplane, free and clear of any and all claims or demands of any kind or nature by the defendants herein or any of them; [18]

2. That plaintiff is entitled to the immediate possession of the C-46A airplane, free and clear of any and all claims or demands of any kind or nature by the defendants herein or any of them;

3. Against the defendants Finn and Interna-

tional Airport Corporation for the possession of the C-46A airplane or the sum of seventy thousand dollars ($70,000.00), the value thereof, in the event delivery of the C-46A airplane cannot be had together with the sum of one hundred and twenty-eight thousand dollars ($128,000.00) damages;

4. Against the defendant Vineland Elementary School District for breach of its agreement with plaintiff in the sum of seventy thousand ($70,000.00) dollars for the loss of the value of the C-46A airplane and one hundred and twenty-eight thousand ($128,000.00) dollars for the loss of the reasonable value of the use thereof;

5. Against the defendants Finn, and defendant Peter A. Bancroft for inducing the defendant Vineland Elementary School District to breach its agreement with the plaintiff in the sum of seventy thousand ($70,000.00) dollars for the loss of the value of the C-46A airplane and one hundred and twenty-eight thousand ($128,000.00) dollars for the loss of the reasonable value of the use thereof;

6. That the defendants pay the plaintiff the costs of this action;

7. For such other and further relief as to the Court may seem just and proper.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant United States Attorney, Chief, Civil Division,

/s/ LEILA F. BULGRIN,
Assistant U. S. Attorney, Attorneys for Plaintiff, United States of America.

Duly verified.

[Endorsed]: Filed September 16, 1952. [19]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT INTERNATIONAL AIRPORTS, INC., TO AMENDED COMPLAINT

Defendant International Airports, Inc., appears, and in answer to plaintiff's amended complaint admits, denies, and alleges as follows:

Answer to First Alleged Cause of Action

I.

Answering paragraphs II, IV, V, VI, VIII, IX, X, XI, and XII thereof, this answering defendant has no information or belief sufficient to enable it answer the same, and basing its denial on that ground denies generally and specifically each and every allegation in said paragraphs contained.

II.

Answering paragraph VII thereof, denies generally and specifically each and every allegation therein contained.

III.

Answering the first sentence of paragraph XIII thereof, [23] denies generally and specifically each and every allegation therein contained; answering the second sentence of said paragraph, admits that by virtue of the chattel mortgage therein mentioned it has an interest in said C-46 airplane as chattel mortgagee; otherwise, denies generally and specifically each and every allegation therein contained. In this connection, this answering defendant alleges that in addition to its rights under said chattel mortgage, it has a valid and subsisting mechanic's lien on said aircraft to the extent of $14,478.43 for work, labor, services and material bestowed thereon.

IV.

Answering the second sentence of paragraph XV, denies generally and specifically each and every allegation therein contained.

Answer to Second Alleged Cause of Action

I.

This answering defendant repeats its answers to paragraphs II, IV, V, VIII and IX of the first cause of action with the same force and effect as though they were fully set forth herein.

II.

Answering paragraph II thereof, denies generally and specifically each and every allegation therein contained.

III.

Answering paragraphs III, IV, and V thereof, this answering defendant has no information or belief sufficient to enable it to answer the same, and basing its denial on that ground, denies each and every allegation therein contained; and expressly denies that plaintiff has been damaged in the amounts, or either amount, set forth in said paragraph V, or in any other amounts, or at all. [24]

Answer to Third Alleged Cause of Action

I.

This answering defendant repeats its answers to paragraphs II, IV, V, VIII and IX of the first cause of action and paragraphs II, III and IV of the second cause of action with the same force and effect as though they were fully set forth herein.

II.

Answering paragraph II thereof, this answering defendant has no information or belief sufficient to enable it to answer the same, and basing its denial on that ground, denies generally and specifically each and every allegation therein contained.

III.

Answering paragraph III thereof, this answering defendant has no information or belief sufficient to enable it to answer the same, and basing its denial on that ground, denies generally and specifically each and every allegation therein contained.

IV.

Answering paragraph IV thereof, this answering

defendant has no information or belief sufficient to enable it to answer the same, and basing its denial on that ground, denies generally and specifically each and every allegation therein contained; and expressly denies that plaintiff has been damaged in the amounts, or either amount, set forth in said paragraph IV, or in any other amount, or at all.

Answer to Fourth Alleged Cause of Action

I.

This answering defendant repeats its answers to paragraphs II, III and VII of the first cause of action and paragraph II of the second cause of action with the same force and effect as though they were fully set forth herein.

II.

Answering that portion of paragraph II thereof to and [25] including the words "without the consent of plaintiff and," together with any or all other allegations in said paragraph with respect to defendants Finn, this answering defendant has no information or belief sufficient to enable it to answer the same, and basing its denial on that ground, denies generally and specifically each and all of said allegations; answering the remainder of said paragraph, denies generally and specifically each and every allegation therein contained.

For a First Separate and Affirmative Defense, This Answering Defendant Alleges That:

I.

On or about August 31, 1951, defendants George

C. Finn and Charles C. Finn (hereinafter sometimes called defendants Finn) entered into a contract in writing with this answering defendant relating to said C-46 aircraft, Registration No. N-111H. A copy of said contract is annexed hereto, marked Exhibit "A," and by reference herein incorporated. Paragraph 8 of said contract Exhibit "A" provides as follows:

"The Finns warrant that they are the sole owners of said aircraft, free from any or all liens or encumbrances, and furnish International herewith a copy of their Certificate of Registration of said aircraft, authenticated by the Civil Aeronautics Administration."

II.

Pursuant to said contract Exhibit "A," and as part of the same transaction, this answering defendant loaned to defendants Finn the sum of $15,000.00 in cash. Said loan was secured by a chattel mortgage on said aircraft in the form annexed hereto, marked Exhibit "B," and by reference herein incorporated.

III.

Said chattel mortgage was recorded with the Civil [26] Aeronautics Administration on November 14, 1951, and provides in part as follows:

"Said Mortgagor hereby declares and hereby warrants to the said Mortgagee that he is the absolute owner of the legal and beneficial title to the said aircraft and in possession thereof, and that the same is free and clear of all liens, encumbrances, and adverse claims whatsoever."

IV.

Further, pursuant to said contract Exhibit "A," and on or about November 15, 1951, defendants Finn delivered said aircraft to this answering defendant for the purposes therein stated; thereafter, and also pursuant to said contract Exhibit "A," this answering defendant bestowed work, labor, services, and materials on said aircraft of the reasonable value of $14,478.43, for which it asserts and claims a mechanic's lien on said aircraft. No part of said sum has been paid, and same is wholly owing and unpaid.

V.

Said money was loaned to defendants Finn, and said work, labor, services and materials were bestowed on said aircraft in good faith, in reliance upon the apparent ownership of said aircraft by defendants Finn, upon the recorded title of said defendants as aforesaid, and prior to receiving notice of any claim of plaintiff herein alleged or that of any other person, firm, or corporation.

Wherefore, defendant prays that plaintiff take nothing as against this answering defendant; that the interests, and each of them, of said defendant, as hereinabove set forth, be recognized and protected as against any claims herein alleged by plaintiff, and for such other and further relief as to the court may seem just.

/s/ A. J. BLACKMAN,
Attorney for Defendant
International Airports, Inc.

EXHIBIT A

[See Deft. International's Exhibit E]

EXHIBIT B

Aircraft Chattel Mortgage

This Mortgage, made this 31st day of August, 1951, by and between George C. Finn and Charles C. Finn, whose address is 6075 Franklin Avenue, Hollywood, California, hereinafter called the Mortgagor, and International Airports, Inc., whose address is Hangar No. 2, Lockheed Air Terminal, Burbank, California, hereinafter called the Mortgagee.

Witnesseth: That the said Mortgagor, being justly indebted unto the said Mortgagee in the sum of Fifteen Thousand Dollars ($15,000) as evidenced by a promissory note referred to herein, grants, bargains, sells, and mortgages to the said Mortgagee, its successors and assigns, the following described aircraft:

Aircraft Make: Curtiss C-46.
Serial No.: 1-232.
CAA Registration No: N-111H.

together with all equipment and accessories attached thereto or used in connection therewith including the following: Any improvements or additions to said aircraft made hereafter, all of which are included in the term aircraft as used herein.

The above described aircraft is hereby mortgaged to the Mortgagee for the purpose of securing in the order named:

First: The payment of all indebtedness evidenced by and according to the terms of that certain promissory note, hereinbelow described, and all renewals and extensions thereof:

> Note bearing date of August 31, 1951, executed by the Mortgagor and payable to the order of International Airports, Inc., Burbank, California, in the aggregate principal sum of $15,000, with interest thereon at the rate of 6 per centum per annum, from date, payable in installments as follows:
>
> The principal and interest of said note is payable in [29] 18 installments of $908.33 each on the first day of each successive month beginning with the 1st day of December, 1951, or sooner if the term of a certain lease of even date with International Airports, Inc., commences sooner. The last payment of $908.33 is due 18 months thereafter.

Second: The prompt and faithful discharge and performance of each agreement of the Mortgagor herein contained made with or for the benefit of the Mortgagee in connection with the indebtedness to secure which this instrument is executed, and the repayment of any sums expended or advanced by the Mortgagee for the maintenance or preservation

of the property mortgaged hereby or in enforcing its rights hereunder.

Said Mortgagor hereby declares and hereby warrants to the said Mortgagee that he is the absolute owner of the legal and beneficial title to the said aircraft and in possession thereof, and that the same is free and clear of all liens, encumbrances, and adverse claims whatsoever.

In the event said lease with International Airports, Inc., is terminated or cancelled for any reason, payments required to be made hereunder shall be extended for a period of one hundred twenty (120) days or, if sooner, until said aircraft is sold or re-leased.

Provided, however, that if the Mortgagor, his heirs, administrators, successors or assigns shall pay said note and the interest thereon in accordance with the terms thereof and shall keep and perform all and singular the terms, covenants, and agreements of this mortgage, then this mortgage shall be null and void.

Time is of the essence of this mortgage. It is hereby agreed that if default be made in the payment of any [30] part of the principal or interest of the promissory note secured hereby at the time and in the manner therein specified, or if any breach be made of any obligation or promise of the mortgagor herein contained or secured hereby, or if any or all of the property covered hereby be hereafter sold, leased, transferred, mortgaged or otherwise encum-

bered without the written consent of the Mortgagee first had and obtained, or in the event of the seizure of the aircraft under execution or other legal process, or if for any other reason the Mortgagee may deem itself insecure, then the whole principal sum unpaid upon said promissory note, with the interest accrued thereon, or advanced under the terms of this mortgage, or secured hereby, and the interest thereon, shall immediately become due and payable at the option of the Mortgagee.

Upon default, Mortgagee may at once proceed to foreclose this mortgage in any manner provided by law, or it may at its option, and it is hereby empowered so to do, with or without a foreclosure action, enter upon the premises where the said aircraft may be and take possession thereof; and remove and sell and dispose of the same at public or private sale, and from the proceeds of such sale retain all costs and charges incurred by it in the taking or sale of said aircraft, including any reasonable attorney's fees incurred; also all sums due it on said promissory note, under any provisions thereof, or advanced under the terms of this mortgage, and interest thereon, or due or owing to the said Mortgagee under any provisions of this mortgage, or secured hereby, with the interest thereon, and any surplus of such proceeds remaining shall be paid to the Mortgagor, or whoever may be lawfully entitled to receive the same. If a deficiency occurs, [31] the Mortgagor agrees to pay such deficiency forthwith.

Said Mortgagee or its agent may bid and purchase at any sale made under this mortgage or herein authorized, or at any sale made upon foreclosure of this mortgage.

In Witness Whereof, the Mortgagor has hereunto set his hand and seal on the day and year first above written.

/s/ GEORGE C. FINN,

/s/ CHARLES C. FINN.

State of California,
County of Los Angeles—ss.

On this 31st day of August, 1951, before me personally appeared the above-named Mortgagors, to me known to be the persons described in and who executed the foregoing chattel mortgage, and acknowledged that they executed the same as their free act and deed.

Given under my hand and official seal the day and year above written.

/s/ HAROLD F. BROWN,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires May 17, 1955.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed October 21, 1952. [32]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS AND PROTECTING PLAINTIFF'S POSSESSION OF PROPERTY

A Notice of Motion to Dismiss or in Lieu Thereof to Quash the Service of Summons, and Order to Shorten Time, together with Points and Authorities in support thereof, having been filed herein by the defendants, George C. Finn and Charles C. Finn, on December 5, 1952, and the said Motion to Dismiss having come on regularly for hearing on December 15, 1952, at 10:00 o'clock a.m., and again on December 22, 1952, at 2:00 o'clock p.m., before the Honorable Harry C. Westover, Judge presiding, and the plaintiff appearing by its attorneys, Walter S. Binns, United States Attorney; Clyde C. Downing and Leila F. Bulgrin, Assistants United States Attorney, the defendant, International Airports, Inc., a corporation, appearing by and through its counsel, A. J. Blackman, and the defendants, Charles C. Finn and George C. Finn, appearing in propria persona and without representation by counsel, and the Court having considered and heard the arguments of counsel and defendants, Charles C. Finn and George C. Finn, and having [33A] considered the Points and Authorities filed by the said defendants, George C. Finn and Charles C. Finn, and counsel for the plaintiff, and the Court having made an Order on December 22, 1952, denying said Motion to Dismiss and upon motion of the plaintiff made in open court for an appropriate order to protect the plaintiff in its

possession of certain property delivered into its possession by claim and delivery proceedings auxiliary to the above-entitled action, the Court having granted said motion, and Good Cause Appearing Therefore,

It Is Hereby Ordered, Adjudged and Decreed that the Motion to Dismiss or In Lieu Thereof to Quash the Service of Summons made by the defendants, George C. Finn and Charles C. Finn, be and the same is hereby denied, and said defendants, George C. Finn and Charles C. Finn, are hereby granted ten days from December 22, 1952, within which to answer plaintiff's Amended Complaint filed herein; and

It Is Hereby Further Ordered, Adjudged and Decreed, that pending entry of final Judgment herein after trial on the merits of the claims of the respective parties to this action, and until a further order of this Court, the plaintiff, United States of America, is and shall be entitled to the sole and exclusive control, custody and possession of the C-46A airplane referred to and described in the Amended Complaint on file herein, and in connection therewith, and that the officers, employees and agents of said plaintiff may do or perform any act or thing in relation to said airplane and its component parts which they deem necessary or convenient to secure, protect, preserve and maintain the same, including the removal thereof by flight or otherwise from its present location to some other location, within the jurisdiction of this Court; and

It Is Further Ordered, Adjudged and Decreed, that until the further order of this Court, the defendants, George C. Finn and Charles C. Finn, International Airports, Inc.; Peter Bancroft, Vineland School District and Seaboard Surety Company, their officers, employees and agents are, and each of them is, enjoined, restrained and prohibited from going near, touching, tampering with, entering, altering, changing, removing or otherwise molesting in any manner the said airplane, or any of its component parts and from doing or performing any act or thing in any relation thereto which will in any manner whatsoever interfere [33B] with, disturb or harass the plaintiff, its officers, employees and agents in the exercise on behalf of plaintiff of the right to have and keep the said airplane in its sole and exclusive control, custody and possession as herein provided.

Dated: This 5th day of Jan., 1953.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed January 6, 1953. [33C]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

To United States of America, above-named Plaintiff, and to Walter S. Binns, U. S. Attorney:

Please Take Notice that the undersigned Defendants, will specially appear for the purposes of this Motion and not otherwise, and move the above-entitled Court in the courtroom of Honorable Harry Westover, United States District Judge, Courtroom No. 5, Second Floor, U. S. Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, on Monday, January 19, 1953, at the hour of 10:00 o'clock a.m., or as soon thereafter as Defendants may be heard, as follows:

1. To dismiss this action as to them and each of them, on the grounds:

(a) Plaintiff alleges a forfeiture was committed by sale of the aircraft to Defendants Finn, pursuant to the laws governing the purchase of the aircraft from the Plaintiff by [34] the Vineland School District.

(b) The Complaint does not state sufficient facts to state a cause of action.

(c) No such forfeiture exists.

(d) The burden of proof is on the Plaintiff.

Dated: January 9, 1953.

/s/ GEORGE C. FINN,

/s/ CHARLES C. FINN,
Defendants.

[Endorsed]: Filed January 9, 1953. [35]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JAN. 19, 1953

Present: The Hon. Harry C. Westover,
District Judge.

Counsel for Plaintiff:

Leila F. Bulgrin, Ass't. U. S. Att'y.
Clyde C. Downing, Ass't. U. S. Att'y.

Defendants:

John Doe Finn, Alleged to Be
George C. Finn, in Pro. Per.

Proceedings:

For hearing motion of defendants, George C. Finn and Charles C. Finn, filed Jan. 9, 1953, to dismiss the action as to them for failure to state a cause of action.

Def't. Finn declines to state his full name, and Attorney Bulgrin states she understands his name to be George C. Finn.

Court Orders motion to dismiss denied and di-

rects defendants, George C. Finn and Charles C. Finn, to answer herein.

Defendant Finn orally demands trial by jury and requests thirty days within which to answer.

Attorney Bulgrin hands copy of order protecting custody of plane to Defendant Finn.

Court orders the matter continued to 2 p.m., for further proceedings and directs the parties, and specifically Defendant Finn, to appear at that time.

At 2:05 p.m., court reconvenes herein and all being present as before, except Attorney Downing. Defendant Finn declines to state his full name in response to request of the Court that he state his full name or be found in contempt of Court.

Court orders that Defendants Finn answer the complaint in ten days.

Attorney Bulgrin presents affidavit, which is filed, and pursuant thereto Court signs order to show cause re contempt (that Defendants Finn show cause why an order should not be entered holding them in contempt for failure to obey order made Dec. 22, 1952, adjudging custody of certain C-46 airplane in custody of plaintiff), returnable Feb. 2, 1953, 10 a.m., which is filed, and copies of said affidavit and Order to Show Cause are handed to Defendant Finn.

Upon request of Court that Defendant Finn state his full name, Defendant Finn again refuses to state his full name, whereupon the Court Finds

him in contempt of court and commits him to custody of U. S. Marshal, and orders this matter continued to 10 a.m., Jan. 20, 1953, for further proceedings.

(See Order adjudging defendant "John Doe" Finn, alleged to be George C. Finn, in contempt, Following:)

EDMUND L. SMITH,
Clerk;

By /s/ E. M. ENSTROM, JR.,
Deputy Clerk. [36]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT FOR DECLARATORY RELIEF, BREACH OF CONTRACT AND CLAIM AND DELIVERY

Come now the defendants, Peter A. Bancroft and the Vineland Elementary School District of Kern County, and for themselves alone answer the Amended Complaint on file herein, as follows:

In Answer to the First Cause of Action of Plaintiff Against the Defendants, Peter A. Bancroft, and Vineland Elementary School District, the Defendants, and Each of Them, Admit, Deny and Allege as Follows:

I.

The defendants, and each of them, deny each and every allegation contained in plaintiff's First Cause of Action, both generally and specifically.

As and for a Second, Separate and Further Answer and Defense to Said First Cause of Action of Said Amended Complaint, the Defendants, and Each of Them, Allege: [37]

I.

That at all times mentioned in plaintiff's Amended Complaint the defendant, Vineland Elementary School District, was and still is the owner of the C-46A airplane, described and referred to in plaintiff's said amended complaint; that these defendants did not solicit offers for the sale of the said C-46A airplane, referred to in plaintiff's said amended complaint, from the defendants George C. Finn and Charles C. Finn, hereinafter referred to as the "defendants Finn"; that the said defendants Finn offered to purchase the said C-46A airplane from the defendant Vineland Elementary School District in December, 1950; that at said time the defendant, Peter A. Bancroft, duly notified the said defendants Finn that said C-46A airplane had been secured by the defendant Vineland Elementary School District pursuant to the provisions of the Surplus Property Act of 1944, and related statutes and regulations, as set forth in paragraph I of plaintiff's First Cause of Action, and that said C-46A airplane would not be sold by the defendant Vineland Elementary School District to the said defendants Finn, or to anyone else, until and unless the consent of the United States Government was first obtained.

II.

That on or about the 1st day of January, 1951, and after the defendants Finn had offered to purchase said C-46A airplane from the defendant Vineland Elementary School District, the said defendant, by and through its duly elected, qualified and acting Board of Trustees, did call and advertise for the reception of bids for the sale of said airplane; that said notice calling for bids was duly posted for two (2) successive weeks, from the 6th day of January, 1951, to and including, the 20th day of January, 1951, in three (3) public places located within the defendant Vineland Elementary School District, in the manner prescribed by law. That an exact copy of said notice calling for bids is attached hereto, marked "Exhibit A," and is hereby referred to and by such reference made a part hereof.

III.

That said notice calling for bids, published as aforesaid, among other things, provides: "Bidders are expressly notified that the aforesaid [38] aircraft was acquired by the District from the Government of the United States and the War Assets Administration, subject to certain restrictions on the use thereof under the deed of conveyance, and the successful bidder will be required to secure the necessary releases to said restrictions from the proper governmental agency of the United States of America."

IV.

That on or about the 22nd day of January, 1951,

the defendants Finn did, in accordance with the provisions of said notice, and at the time and place specified in said notice, submit a bid for the purchase of said C-46A airplane from the defendant Vineland Elementary School District, which bid was duly accepted by the said defendant Vineland Elementary School District by and through its duly qualified, elected and acting Board of Trustees. That in said bid the said defendants Finn expressly agreed to secure the consent of the Government of the United States to the sale of said C-46A airplane and did further agree to secure a waiver from the said United States Government, and from any related governmental agency thereof, of any and all restrictions on the use of said C-46A airplane existing by virtue of any Federal law, or by virtue of any agreement between the said Vineland Elementary School District and the said United States Government, or related governmental agency thereof.

V.

That on or about the 28th day of February, 1951, and in accordance with said notice and with said bid submitted by the defendants Finn, the defendant Vineland Elementary School District and the said defendants Finn did enter into a written agreement for the sale of said C-46A airplane by said district to said defendants Finn. That in said agreement it was expressly agreed by the said defendants, and all of them, that the sale of said C-46A airplane was subject to any and all restrictions imposed by the United States Government on the use

and sale thereof, and that the said defendant Vineland Elementary School District was entitled to the sole use and possession of said C-46A airplane for educational purposes only, until such time as the said defendants Finn had secured the consent of the United States Government and related [39] governmental agencies thereof, to the sale and use thereof; that an exact copy of said written agreement is attached hereto and marked "Exhibit B," and is hereby referred to and by such reference made a part hereof.

VI.

That on or about the 15th day of August, 1952, and while said C-46A airplane was in the possession of the defendant Vineland Elementary School District, the defendants Finn represented to the defendant, Peter A. Bancroft, that the said defendants Finn had secured the consent of the United States Government to the sale of said airplane, and that the said defendants Finn had also secured from the said United States Government a waiver of any and all restrictions to the sale and use of said airplane. That the defendants, Peter A. Bancroft and the Vineland Elementary School District, are now informed and believe, and upon the basis of such information and belief allege that said representations were false.

VII.

That on the basis of said representations made by the said defendants Finn, as aforesaid, and with the full belief that said representations were true, the

defendant Peter A. Bancroft released said C-46A airplane to said defendants Finn; that said defendant, Peter A. Bancroft, was induced to release said C-46A airplane, as aforesaid, as a direct result of said false and fraudulent representations; that the defendants Finn did then and there remove said C-46A airplane from the possession and custody of the defendant Vineland Elementary School District: that said C-46A airplane was removed from the possession and custody of said Vineland Elementary School District, through the false and fraudulent representations of the defendants Finn.

VIII.

That by reason of the facts and circumstances herein alleged, the defendant Vineland Elementary School District did not breach its agreement with the Government of the United States, or any related governmental agency thereof; that said defendant is still entitled to the sole use and possession of said C-46A airplane for educational purposes; that said C-46A airplane [40] was at all times mentioned in plaintiff's amended complaint, and still is, the property of the defendant Vineland Elementary School District.

As and for a Third, Separate and Further Answer and Defense to Said First Cause of Action of Said Amended Complaint, the Defendant, Vineland Elementary School District, for Itself Alone, Alleges:

I.

The defendant here refers to all of the allegations

contained in paragraphs I, II, III, IV, V, VI, VII, and VIII of its second affirmative defense against the plaintiff's First Cause of Action, and repleads each of said allegations in this third separate and further defense against the said plaintiff, with the same force and effect as though they were fully set forth herein.

II.

That the defendants Finn secured possession of the said C-46A airplane through false and fraudulent representations and without the consent of the duly elected, qualified and acting Board of Trustees of the Vineland Elementary School District.

In Answer to the Second Cause of Action of Plaintiff Against the Defendants, Peter A. Bancroft and Vineland Elementary School District, the Defendants, and Each of Them, Deny and Allege as Follows:

I.

That the defendants and each of them deny each and every allegation contained in plaintiff's Second Cause of Action, both generally and specifically.

As and for a Second, Separate and Further Answer and Defense to Said Second Cause of Action of Said Amended Complaint, Defendants, and Each of Them, Allege:

I.

The defendants, and each of them, here refer to all of the allegations contained in paragraphs I, II,

III, IV, V, VI, VII and VIII of their second affirmative defense against the plaintiff's First Cause of Action and replead each of said allegations in this second, separate and further defense against the plaintiff's Second Cause of Action as though the same were fully set forth herein. [41]

As and for a Third, Separate and Further Answer and Defense to Said Second Cause of Action of Said Amended Complaint, the Defendant, Vineland Elementary School District, for Itself Alone, Alleges as Follows:

I.

Said defendant here refers to all of the allegations contained in paragraphs I, II, III, IV, V, VI, VII and VIII of its second affirmative defense against the plaintiff's First Cause of Action and repleads each of said allegations in this third, separate and further defense against the plaintiff's Second Cause of Action, with the same force and effect as though they were fully set forth herein.

II.

The said defendant here refers to all of the allegations of paragraph II of its third affirmative defense against the plaintiff's First Cause of Action and repleads each of said allegations in this third, separate and further defense against the plaintiff's Second Cause of Action, with the same force and effect as though they were fully set forth herein.

In Answer to the Third Cause of Action of Plaintiff Against the Defendants, Peter A. Bancroft and Vineland Elementary School District, the Defendants, and Each of Them, Admit, Deny and Allege as Follows:

I.

That the defendants, and each of them, deny each and every allegation contained in plaintiff's Third Cause of Action, both generally and specifically.

As and for a Second, Separate and Further Answer and Defense to Said Third Cause of Action of Said Amended Complaint, Defendants, and Each of Them, Allege:

I.

The defendants, and each of them, here refer to all of the allegations contained in paragraphs I, II, III, IV, V, VI, VII, and VIII of their second affirmative defense against the plaintiff's First Cause of Action, and replead each of said allegations in this second, separate and further defense against the plaintiff's Third Cause of Action, with the same force and effect as [42] though they were fully set forth herein.

As and for a Third, Separate and Further Answer and Defense to Said Third Cause of Action of Said Amended Complaint, the Defendant, Vineland Elementary School District, for Itself Alone, Alleges as Follows:

I.

Said defendant here refers to all of the allega-

tions contained in paragraphs I, II, III, IV, V, VI, VII and VIII of its second affirmative defense against the plaintiff's First Cause of Action, and repleads each of said allegations in this third, separate and further defense against the plaintiff's Third Cause of Action, with the same force and effect as though they were fully set forth herein.

II.

That the said defendant here refers to all of the allegations contained in paragraph II of its third affirmative defense against the plaintiff's First Cause of Action, and repleads each of said allegations in this third separate and further defense against the plaintiff's Third Cause of Action, with the same force and effect as though they were fully set forth herein.

In Answer to the Fourth Cause of Action of Plaintiff Against the Defendants, Peter A. Bancroft and Vineland Elementary School District, the Defendants, and Each of Them, Admit, Deny and Allege as Follows:

I.

In answer to plaintiff's Fourth Cause of Action, insofar as said Fourth Cause of Action pertains to these defendants, the said defendants deny each and every allegation contained therein, both generally and specifically.

Wherefore, the defendants, Peter A. Bancroft and Vineland Elementary School District, and each of them, pray judgment as follows:

1. That plaintiff take nothing by its action.

2. That this Honorable Court adjudicate that the defendant, Vineland Elementary School District, is the owner of the C-46A airplane described in plaintiff's amended complaint and is entitled to the use and possession thereof [43] for educational purposes, free and clear of any and all claims or demands of any kind or nature by the plaintiff, or by any of the defendants named in plaintiff's amended complaint.

3. That the plaintiff pay the defendants the costs of this action.

4. For such and other further relief as to the Court may seem just and proper.

/s/ ROY GARGANO,

County Counsel for the County of Kern. Attorney for Defendants Peter A. Bancroft and Vineland Elementary School District. [44]

State of California,
County of Kern—ss.

Roy Gargano, being first duly sworn, deposes and says:

That he is the Attorney for the defendants Peter A. Bancroft and Vineland Elementary School District, in the foregoing action; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, ex-

cept as to matters therein stated upon information and belief, and that as to those matters he believes it to be true.

/s/ ROY GARGANO.

Subscribed and sworn to before me this 30th day of January, 1953.

[Seal] /s/ EDNA MURPHY,
Notary Public in and for the County of Kern, State of California.

My Commission Expires July 21, 1954. [45]

EXHIBIT A

Notice for Bids

Notice Is Hereby Given, that the Board of Trustees of the Vineland School District will receive bids up to 5:00 o'clock p.m., on the 20th day of January, 1951, at the office of the Superintendent of the said school district, for the sale by the district, of a C-46 Aircraft, No. 23645. The said aircraft may be inspected at Sunset School. Bidders are expressly notified that the aforesaid aircraft was acquired by the district from the Government of the United States and the War Assets Administration, subject to certain restrictions on the use thereof under the deed of conveyance, and the successful bidder will be required to secure the neces-

sary releases to said restrictions from the proper governmental agency of the United States of America.

All bidders are further notified that the successful bidder shall be required to furnish the district with a non-flyable, C-46 type aircraft, or equal, designed for educational purposes pursuant to and in accordance with the specifications on file in the office of the Superintendent, where said specifications may be examined and copied. Said successful bidder shall be required to furnish the district with said non-flyable aircraft, together with instruments of title thereto, at no cost whatsoever to the district.

Bids shall be in a sealed envelope, addressed to the Board of Trustees of the Vineland School District, Route 6, Box 207, Bakersfield, California, marked "Bids for Purchase of C-46 Aircraft," and will be opened at 10:00 o'clock p.m., on the 22nd day of January, 1951.

The Board reserves the right to waive any informality in bidding and also to be the sole judge of the value and merit of all bids, or to reject all bids.

By order of the Board of School Trustees, this 6th day of January, 1951.

/s/ FELIX LUNDQUIST,
Clerk.

[The foregoing Exhibit A was introduced in evidence as Vineland's Exhibit A.] [46]

EXHIBIT B

Agreement

This Agreement, made and entered into on this 28th day of February, 1951, at Bakersfield, California, by and between George C. Finn and Charles C. Finn, jointly, as Parties of the First Part, hereinafter referred to as "Contractors," and the Vineland School District, a political subdivision of the State of California, located in Kern County, as Second Party, hereinafter referred to as the "District";

Witnesseth:

Whereas, the District did heretofore advertise for bids for the sale of a C-46 Aircraft No. 23645, in the manner prescribed by law and in the manner prescribed by the applicable provisions of the Education Code of the State of California, and

Whereas, the Contractors submitted their written bid to purchase said C-46 Aircraft No. 23645 from the District. Said bid was in accordance with the aforesaid "Notice Calling for Bids" and with the specifications adopted by the District and referred to in said notice, a copy of which specifications are attached hereto, marked "Exhibit A," and made a part hereof as if fully set out at length; and

Whereas, the bid submitted by the Contractors was the only bid received by the District and was duly accepted by the District in the manner provided by law, and in the manner provided by applicable provisions of the Education Code; and

Whereas, the parties are now desirous of executing a written agreement, setting forth the exact terms and conditions under which said bid was made by the Contractors and accepted [47] by the District, in accordance with the understanding of the parties and in accordance with the said specifications, marked "Exhibit A";

Now, Therefore, in consideration of the covenants, promises and terms and conditions hereinbelow set out, It Is Mutually Agreed between the parties, as follows:

I.

The District hereby transfers all of its right, title and interest in and to that certain C-46 Aircraft No. 23645 to the Contractors, effective immediately upon the execution of this agreement. Concurrently with the execution of this agreement the District agrees to execute a Bill of Sale and/or transfer of title to the said aircraft to the Contractors.

II.

The Contractors hereby agree, and do hereby accept the possession and title of said C-46 Aircraft No. 23645, as evidenced by this agreement, and the aforesaid Bill of Sale and/or transfer of title; provided, however, the Contractors agree that irregardless of the transfer of possession and title of said C-46 Aircraft No. 23645, the sole use of said aircraft shall be and the same is reserved to the District for educational purposes only, until such time as all of the terms and conditions set forth in this agreement are fully performed by Contractors in

a reasonable and competent manner, provided, still further, that the Contractors shall have the right of entry on and in said C-46 Aircraft No. 23645 and the right to perform mechanical repairs thereon during all times which the District is not using said aircraft for educational purposes and after school hours. [48]

III.

For and in consideration of the transfer of all of its right, title and interest in and to the aforedescribed C-46 Aircraft No. 23645 by the District to the Contractors, the Contractors expressly Agree as follows:

(1) To furnish to the District one C-46 Aircraft No. 42-96563, together with a Bill of Sale and/or transfer of title executed by said Contractors, and to deliver said aircraft to the District upon the District premises, in such position as may be designated by the District. Said C-46 Aircraft No. 42-96563 to conform with all of the specifications contained in Paragraph I. of "Exhibit A." and of Paragraph II., "Exhibit A," sub-Sections 1 to 9, inclusive, and to conform with accepted standards for instructional aircraft in the area in which the District is located.

(2) To pay to the District the total sum of Five Thousand Dollars ($5,000.00).

(3) To furnish the District with all of the material and equipment listed in Paragraph II. of the Specifications, marked "Exhibit A."

(4) To perform all of the services called for in the said specifications, marked "Exhibit A," in a competent and workmanlike manner, and in accordance with the standards for such work in the area in which the District is located.

(5) To post a faithful performance Bond in the sum of Twenty-one Hundred Dollars ($2,-100.00) concurrently with the execution of this agreement, to guarantee Contractors faithful performance of the terms and [49] conditions set forth in this agreement, and particularly in the aforesaid specifications, marked "Exhibit A," with the exception of that obligation incurred by the Contractors in Paragraph III (2) hereof.

IV.

It Is Expressly Agreed and Understood, that this agreement is contingent upon Contractor's ability to secure the necessary clearances from the Government of the United States of America on restrictions now existing on the use and possession of the aforedescribed C-46 Aircraft No. 23645, by virtue of the Deed of Conveyance of said aircraft from the said Government of the United States to the District, and by virtue of related Federal laws on the use thereof. Therefore, notwithstanding any other provisions in this agreement, It is Understood and Agreed, as follows:

(1) The Contractors shall have a period of six (6) months from the date of this agreement to perform the terms and conditions of Paragraph III

hereof, and to secure the aforesaid clearances from the Government of the United States of America. In the event that the said Contractors are unable to secure the said Government clearances, then and in that event, the Contractors, at their option, shall be released from any and all obligations contained in this agreement, with the exception of those obligations incurred by the Contractors under the provisions of sub-Sections 12, 14 and 19 of Paragraph II, of the Specifications, attached hereto as "Exhibit A," and referred to in Paragraph III (3) hereof, it being the intent of the parties that the furnishing of those items specified in sub-Sections 12, 14 and 19 of Paragraph II of the said specifications by the Contractors [50] to the District shall be, and it is the consideration for the Contractors' release of any further obligation under this agreement.

(2 In the event the Contractors do not desire to exercise their option to terminate this agreement at the expiration of the aforesaid six (6) months' period, then and in that event the District shall, and does hereby extend the Contractors an additional six (6) months' period in which to perform under the terms of Paragraph III, and in which to secure the aforesaid Government clearances. In the event the said Contractors are unable to secure the said necessary Governmental clearances within said additional six (6) months' period, then and in that event the Contractors, at their option, shall be released from any and all obligations contained in this agree-

ment, with the exception of those obligations incurred by the Contractors under the provisions of sub-Sections 12, 14, 17 and 19 of Paragraph II of the specifications, attached hereto as "Exhibit A," it being the intent of the parties that the furnishing of those items specified in sub-Sections 12, 14, 17 and 19 of Paragraph II of the said specifications by the Contractors to the District shall be, and it is the consideration for the Contractors' release of any further obligation under this agreement.

(3) It is expressly agreed and understood, that in the event the Contractors exercise their option to terminate this agreement under the provisions of sub-Paragraphs (1) and (2), supra, they shall immediately reconvey said C-46 Aircraft No. 23645 by proper Bill of Sale to the District.

(4) In the event the Contractors are unable to secure the aforesaid Governmental releases within one (1) year from the date of this agreement, and in the event [51] the Contractors have not exercised their option to terminate this agreement, as heretofore provided, then and in that event said Contractors shall, nevertheless, be entitled to delivery of the aforesaid C-46 Aircraft No. 23645 for salvage purposes only; provided, satisfactory assurance is given to the District that existing Governmental restrictions will not be violated by the Contractors, or by any other person, firm or corporation, with or without the consent of the Contractors, and provided that the Contractors have fully performed all of the conditions of this agreement.

V.

It Is Expressly Agreed and Understood, that this agreement is subject to the following conditions:

(1) Neither party has relied upon any warranties, either written or oral, concerning the physical condition of the said C-46 Aircraft No. 23645, save and except that the District guarantees that at the conclusion of its period of use, as herein provided, the said aircraft shall be in as good a condition as it is at the present time, reasonable wear and tear excepted.

(2) The District shall not be responsible for the safekeeping of said C-46 Aircraft No. 23645 during the period which the District shall have the use thereof, other than for its own acts of negligence and the negligence of its employees, and it shall be the duty of the Contractors to carry proper insurance; provided, however, that the District does hereby agree to save the Contractors harmless from any and all claims which may arise by virtue of death, personal injuries to, or damage to the property, [52] either real or personal, of any and all persons while in or about said aircraft during the period of the District's use thereof, unless the said death, injuries or damages are caused through the negligence of the Contractors and/or their agents or employees.

(3) This agreement shall be binding upon and inure to the benefit of the respective heirs, executors, successors, administrators, assigns and legal representatives of the parties hereto.

(4) Any notices sent by either party to the other under this agreement, or in connection herewith, may be sent by "registered mail" to the last known address of the party receiving such notice.

(5) In the event either party is prevented from performing any terms or conditions of this agreement by any Act of God, said party shall be released from performance of said terms or conditions, unless the other party is willing to waive, in writing, his and/or its right to performance of those terms or conditions.

In Witness Whereof, these presents have been executed on the day and year first hereinabove written.

/s/ GEORGE C. FINN,

/s/ CHARLES C. FINN,
Parties of the First Part.

Witness:

/s/ VIOLET REYNOLDS.

VINELAND SCHOOL DISTRICT,

By /s/ FELIX LUNDQUIST,
Party of the Second Part.

Witness:

/s/ HALLIE KILLEBREW.

[The foregoing Exhibit B was introduced in evidence as Vineland's Exhibit B.]

[Endorsed]: Filed February 2, 1953. [53]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS, GEORGE C. FINN AND CHARLES C. FINN, TO AMENDED COMPLAINT

Defendants, George C. Finn and Charles C. Finn, appear, and in answer to plaintiff's amended complaint, admit, deny and allege as follows:

Answer to First Alleged Cause of Action

I.

Answering the first sentence of Paragraph II thereof, admit that defendants reside in or about the County of Los Angeles, California, and deny, generally and specifically, each and every other allegation therein contained.

II.

Answering Paragraphs III, IV, V, VI and XIII thereof, these answering defendants have no information or belief sufficient to enable them to answer the same, and basing their denial upon that ground, deny generally and specifically each and every allegation [54] in said paragraphs contained.

III.

Answering Paragraph VII thereof, deny generally and specifically each and every allegation therein contained.

IV.

Answering Paragraph XI, deny generally and specifically each and every allegation contained in

the first sentence therein beginning with the words "in violation" and ending with the words "C-46A airplane." Admit as to all other allegations in the first sentence of Paragraph XI.

Answering the second sentence of Paragraph XI, deny each and every allegation contained therein.

V.

Answering the first sentence of Paragraph XII, deny generally and specifically each and every allegation contained therein. Admit as to each and every allegation contained in the second sentence of Paragraph XII, and in this connection the answering defendants allege that in addition to their rights under the purchase from the Vineland School District, they secured acknowledgement of ownership to said aircraft, and registration to fly said C-46A Aircraft, from the plaintiff.

VI.

Answering Paragraph XIV, deny generally and specifically each and every allegation therein contained.

VII.

Answering the second sentence of Paragraph XV, deny generally and specifically each and every allegation therein contained.

Answer to Second Alleged Cause of Action

I.

These answering defendants repeat their answers to Paragraphs III, IV, V and VIII of the First

Cause of Action with the same force and effect as though they were fully set forth herein. [55]

II.

Answering Paragraph II thereof, deny generally and specifically each and every allegation therein contained.

III.

Answering Paragraph III thereof, deny each and every allegation therein contained, and in this connection allege the Vineland Elementary School District on or about February 28, 1951, did sell and transfer to defendants Finn, the full legal and beneficial title to the C-46 Airplane and delivered to them the possession of said airplane.

IV.

Answering Paragraph IV thereof, beginning with the word "Plaintiff" and ending with the words "non-flight instruction" defendants have no information or belief sufficient to enable them to answer the same, and basing their denial on that ground, deny each and every allegation therein contained; and further deny generally and specifically that portion thereof beginning with the words "and the defendant," and ending with the words "as scrap." In this connection, defendants allege that the Vineland Elementary School did purport to sell said aircraft to defendants as scrap, but with the consent of the plaintiff did sell and deliver the same to defendants in the condition of an assembled airplane which could be, and soon thereafter was, rendered flight-

worthy by defendants and flown by the authority conferred upon defendants by the plaintiff.

V.

Answering Paragraph V thereof, deny each and every allegation therein contained; and expressly deny that plaintiff has been damaged in the amounts, or either amount, set forth in said Paragraph V, or in any other amounts, or at all.

Answer to Third Alleged Cause of Action [56]

I.

These answering defendants repeat their answers to Paragraphs III, IV, V, VIII and IX of the First Cause of Action, and Paragraphs II, III and IV of the Second Cause of Action, with the same force and effect as though they were fully set forth herein.

II.

Answering Paragraph III thereof, deny generally and specifically each and every allegation therein contained, and in this connection, defendants allege they wilfully, intentionally and actively caused the Vineland Elementary School District to sell and deliver to defendants Finn the C-46A aircraft, with the knowledge and consent of the plaintiff; said consent of the plaintiff was wilfully, intentionally and actively secured by defendants.

III.

Answering Paragraph IV thereof, deny generally and specifically each and every allegation therein

contained, and expressly deny that plaintiff has been damaged in the amounts, or either amount set forth in Paragraph IV, or in any other amount, or at all; and allege that plaintiff has been benefitted by actions for which plaintiff claims damages.

Answer to Fourth Alleged Cause of Action

I.

These answering defendants repeat their answers to Paragraphs II, III and VII of the First Cause of Action, and Paragraph II of the Second Cause of Action, with the same force and effect as though they were fully set forth herein.

II.

Answering Paragraph II thereof, deny generally and specifically each and every allegation therein contained, and expressly deny that plaintiff has been damaged in the amounts, or either amount set forth in Paragraph II, or in any other amount, or [57] at all.

For a First Affirmative Defense Against Plaintiff's Amended Complaint and Each and All of the Alleged Causes of Action Therein Contained, These Defendants Allege:

I.

Prior to the time these defendants purchased said aircraft from defendant, Vineland Elementary School District, plaintiff informed these defendants

that they had the right to purchase said aircraft from Vineland Elementary School District and to fly the same, and that Vineland Elementary School District had previously received good title from plaintiff and had the right to sell said aircraft to these defendants; that plaintiff thereby induced these defendants to purchase and they did in fact purchase said aircraft from Vineland Elementary School District for flight purposes; that at said time plaintiff granted these defendants permission to fly said aircraft and authorized them to register it in their names; that by reason of the foregoing, plaintiff is not entitled to any relief under its pleadings and is estopped from recovering anything in this case.

Wherefore, these defendants pray that plaintiff take nothing under its Amended Complaint and that they be dismissed with their costs.

GEORGE C. FINN and
CHARLES C. FINN,

By /s/ GEORGE C. FINN,
In Propria Persona.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 16, 1953. [58]

United States District Court, Southern District of California, Central Division

No. 14309-HW—Civil

CHARLES C. FINN,

Plaintiff,

vs.

UNITED STATES OF AMERICA, COLONEL J. L. ULRICSON,

Defendants.

CROSS-COMPLAINT

(Damages)

Plaintiff complains of Defendants and each of them, and for cause of action alleges:

I.

That Plaintiff now, and at all times herein mentioned, was the owner of, and entitled to the possession of that certain C-46A Aircraft, registration number N-111H, presently located at Nellis Air Force Base, Las Vegas, Nevada.

II.

That on the 28th day of January, 1953, the Defendants, without right and without the consent of Plaintiff, by force and violence, unlawfully took possession of said aircraft, and have ever since detained by force of arms, and do now so detain, possession thereof against the will and without the consent of the Plaintiff.

III.

That by reason of said unlawful seizure and detention of Plaintiff's property, widespread publicity was given to said action and especially in business circles, and Plaintiff has been injured in his reputation and credit, and has been deprived of said property, and has been deprived of his means of livelihood and has been unable to pay his just debts and otherwise has suffered an injury to property in this State. [60]

For a Further Separate and Second Cause of Action Alleges:

I.

That Defendant, United States of America, made a verbal and written binding confirmation of Plaintiff's ownership in said aircraft, and that Plaintiff provided the agents of the United States with all facts, laws, documents, transactions and other evidence of ownership by the Plaintiff, Plaintiff having purchased said aircraft from the Vineland School District, Bakersfield, California.

II.

That Defendant, United States of America, or any Agency thereof, possesses no fact, no law, no document, no transaction and no evidence of ownership of said aircraft by the United States of America.

III.

That notwithstanding the foregoing, the Defendant, United States of America, through its Agents

and employees, Walter Binns, Clyde Downing and Leila Bulgrin, caused to be filed in the United States District Court, Southern Division, an action to recover Seventy Thousand Dollars ($70,000.00), or the aircraft, and damages of One Hundred Twenty-eight Thousand Dollars ($128,000.00) for Defendant's loss of use of Plaintiff's aircraft; this, despite the fact that Defendant, United States of America, sold said Aircraft five years prior to the Court action, to Vineland School District, Bakersfield, California, for the sum of Two Hundred Dollars ($200.00); and that during this five-year period, not one cent had been paid by the Vineland School District to the United States of America for its non-use of said Aircraft, since said Defendant had deprived itself of any further use of the aircraft by virtue of said sale, coupled with a warranty to "reduce the aircraft to scrap" if disposed of within three (3) years of acquisition. [61]

IV.

That on the 18th day of September, 1952, Agents Binns, Downing and Bulgrin, (pursuant to an amendment of the above-mentioned Court action) having knowingly falsely adopted unto their use, California Code of Civil Procedure, Sections 509, 510, 511, 512, 513 and 514, though unavailable to Federal District Courts in original actions, and having filed false claims of ownership, and having caused to be filed false Affidavits of seizure and service by U. S. Marshal, David Hayden did un-

lawfully seize Plaintiff's aircraft at Kern County Airport, Bakersfield, California.

V.

That on or about the 2nd day of February, 1953, said aircraft having been removed from under such unlawful seizure to Nevada, Agents Binns, Downing and Bulgrin conspired with Colonel J. L. Ulricson, Commanding Officer of Nellis Air Force Base, Las Vegas, Nevada, to again unlawfully seize Plaintiff's aircraft, this time by force and violence, and to retain possession thereof, and to deny Plaintiff rightful use thereof by force of arms; and Defendant Ulricson did seize, and does now detain possession of said aircraft against the will, and without consent of the Plaintiff.

For a Further Separate and Third Cause of Action Alleges:

I.

That pursuant to the removal of said aircraft to Nevada from the unlawful seizure under the California Code, Agents Binns, Downing and Bulgrin caused Plaintiff to be falsely charged with a felony, alleging the stealing of his own aircraft and transporting same in foreign commerce to Mexico.

II.

That Agents Binns, Downing and Bulgrin caused Plaintiff's arrest by the Federal Bureau of Investigation on the said false charges, though the aircraft had never been in Mexico, and its [62] location was

unknown to the Federal Bureau of Investigation at the time of arrest.

III.

That when Plaintiff notified Defendant, United States of America, as to the location of the aircraft in Nevada, Agents Binns, Downing and Bulgrin caused Plaintiff to be falsely charged with a felony alleging the stealing of Plaintiff's own property by transporting said aircraft across a State line to Nevada. That Plaintiff was falsely arrested without a Warrant, and falsely imprisoned for four days and nights therefor.

IV.

That the Los Angeles Federal Grand Jury returned a "No Bill" upon evidence submitted by Agents Binns, Downing and Bulgrin in an attempt to support an indictment on their false charges.

V.

That failing to sustain these false charges, Agent Bulgrin threatened Plaintiff with bodily harm.

VI.

That Agents Binns, Downing and Bulgrin falsely charged Plaintiff with criminal contempt of Court, alleging removal of the aircraft by the Plaintiff from the custody of the Court, violating a Court order to not disturb the aircraft, removing the aircraft from the jurisdiction of the Court, and violating a Court order giving the aircraft to the possession of the Defendant, United States of America.

VII.

That a trial was duly held in the United States District Court, Southern Division, Judge Harry Westover presiding, on June 15th, 1953, and said Court returned an order that Plaintiff was not in contempt of court on any of four counts as charged. A copy of said ruling is hereto attached. [63]

For a Further Separate and Fourth Cause of Action Alleges:

I.

That Plaintiff does not admit to the authority of the Federal Government, under Rule 64 of Federal Rules of Civil Procedure, to utilize existing California Statutes in an original action of Claim and Delivery in the Federal District Court, but since the Defendant, United States of America has claimed California Code of Civil Procedure, Sections 509, 510, 511, 512, 513 and 514, as its sole authority for seizing Plaintiff's property, and thus has restricted its claim, either in law or in argument to this State Statute, Defendant, United States of America, must comply with the correct legal procedure therein contained.

II.

That having adopted unto their use the powers set forth under California Civil Code of Procedure, Sections 509 to 514, inclusive, by virtue of Federal Rules of Civil Procedure, Rule 64, the Agents of the United States of America failed to correctly hew to the just and recognized forms therein set forth.

III.

That while the Defendant did set forth as its sole legal justification for the seizure of Plaintiff's property, the jurisdiction prescribed under the Sections of California Code of Civil Procedure herein set forth, Defendant did not comply with the correct procedure for the seizure of the property under said Statutes (which shall, for all purposes forthwith, be referred to in this Complaint as "Claim and Delivery," as indeed it is known to all who come before the law in the just Courts of this sovereign State).

IV.

That Defendant did seize said aircraft knowing full well that Defendant had not fulfilled the requirements of California law. [64]

V.

That Defendant, United States of America, did so with malicious aforethought to damage the Plaintiff by depriving him of use of his legal property, by holding him up to ridicule in the public eye, and by defaming him as a man of honor in the eyes of those who would enter under prior circumstances into profitable business relations with the Plaintiff.

VI.

That Defendant, United States of America, did so, if not in purpose, with the knowledge that by taking such action Defendant violated the laws of this Commonwealth, by so using the laws of California as a subterfuge.

VII.

That Defendant violated the requirements set forth in the California Code of Civil Procedure as follows:

1. No Affidavit of Ownership was filed by Defendant prior to seizure of the aircraft.

2. No Service of process of seizure was made on Plaintiff before seizure, after seizure, or at all.

3. Aircraft was seized without filing the seizure process of the Court.

4. A false Affidavit of Seizure was executed on September 18, 1952, by U. S. Marshal David Hayden.

5. A false Affidavit of Service on Plaintiff of seizure of aircraft was executed by David Hayden, U. S. Marshal, on September 18, 1952, and was filed October 31, 1952.

6. The above-mentioned false Affidavit of Service and seizure was altered after filing, in an attempt to destroy the Affidavit.

7. A false Affidavit of seizure was executed by U. S. Marshal David Hayden on October 13, 1952, and was filed on October 31, 1952. [65]

8. A false return of service on Plaintiff was executed by U. S. Marshal David Hayden on October 13, 1952, and filed October 31, 1952.

9. At no time did Plaintiff receive Notice of Seizure, nor was Plaintiff given an opportunity, as

provided by law, to accept to the Surety, or to have a hearing on the seizure, or to Bond the aircraft back.

10. That the property was never, at any time, as provided by law, taken into the possession of the Marshal, nor was any Notice of Seizure placed on the aircraft, nor was any care taken of it.

11. At the present writing, August 26, 1953, no Notice of Seizure, or any other written communication confirming the due process of law in this seizure had ever been served on the Plaintiff.

12. That said aircraft, and its rightful use thereof, at all times, has been, and now is withheld from Plaintiff by threats of arrest and imprisonment, and by force of arms of the Military establishment of the United States of America.

For a Separate and Fifth Cause of Action Alleges:

I.

That Agents Binns, Downing and Bulgrin agreed to withhold prosecution of their action filed in the Federal District Court upon the request of Congressman Chet Hollifield; for the withholding of prosecution, Plaintiff was to give his aircraft to a fictitious Corporation to be owned by Charles C. Finn, George C. Finn and one Michael J. O'Rourke, former Postmaster of Beverly Hills, California. The one-third (⅓) interest in the corporation owned by Michael J. O'Rourke, was to be enjoyed silently by Congressman Hollifield [66] and Attor-

ney Paul Ziffren, formerly Collector of Internal Revenue, Chicago, Illinois, for their influence in fixing the case in Washington.

II.

That Plaintiff, after receiving written assurance from Binns, Downing and Bulgrin (Agents), because of the above arrangement, that "no action would be taken in the Finn case without first giving Finns a ten-day notice of any action, or proposed action," declined to form such a Corporation, and that Defendant forthwith instituted the foregoing illegal actions, false charges, false arrests and false affidavits.

III.

That Defendant, United States of America, through its Agents Binns, Downing and Bulgrin, Ulricson and others in the Department of Defense, Department of Justice, Department of Commerce, Department of Treasury and Department of State, has spent in excess of One Hundred and Fifty Thousands Dollars ($150,000.00) of Government funds, executed the aforementioned false affidavits of seizure, false arrests, false claims and committed perjury for the sole purpose of coercing Plaintiff into a settlement of Defendant's illegal Court actions which Defendant could not substantiate in a just court.

IV.

That said "settlement" is necessary to Defendant, United States of America, to protect certain Government officials who have illegally disposed of

thirty to sixty million dollars ($30,000,000) ($60,-000,000) worth of aircraft, privately owned by schools and other institutions, to certain chosen individuals engaged in speculation in the world aircraft market, including the Iron Curtain countries. In reference to this "settlement," the Defendant, United States of America, has offered to dismiss their One Hundred Ninety-Eight Thousand Dollar ($198,000.00) Court action against Plaintiff for the sum of Twenty-five Hundred Dollars [67] ($2,-500.00) paid in hand to the Defendant, United States of America, which Plaintiff has refused to do.

V.

That the trial of said action, taken by the Agents of Defendant, United States of America, to determine ownership in the aircraft was set for July 13, 1953. This was more than a year from the commencement of action, but the said Agents intentionally, and with malice, had the trial postponed until November, 1953, and taken off the calendar for resetting in November, 1953, for the sole purpose of forcing Plaintiff, through financial inequities, to settle the case out of Court.

VI.

That in all of their malicious deeds, the Agents of Defendant, United States of America, on orders from Washington, acted wilfully and deliberately with malice and intent to deprive Plaintiff of his property without due process of law, and to commit him to prison in order to prevent the expose of

Defendant's illegal sale of eleven hundred and thirty-five (1,135) or more similar privately-owned aircraft by Government officials in Washington.

VII.

That the foregoing acts of Defendant were, at all times, known to Defendant to be false, groundless, oppressive and malicious, and were for the purpose of, and did cause, injury to property of the Plaintiff, and deprived him of his constitutional rights.

VIII.

That there is now due, owing and unpaid by reason of said injury to property, the sum of Two Million, Nine Hundred and Ninety-Nine Thousand, Nine Hundred and Ninety-Nine Dollars ($2,999,-999.00).

Wherefore, Plaintiff prays judgment against the Defendant, and each of them, for monies due to Plaintiff as herein alleged, and for such other relief as to the Court may deem just.

/s/ CHARLES C. FINN,
Plaintiff.

It is so ordered:

Date: Sept. 10, 1953.

/s/ HARRY C. WESTOVER,
Judge. [68]

(Copy)

In the United States District Court, Southern District of California, Central Division

No. 22705—Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE C. FINN, CHARLES C. FINN,

Defendants.

Honorable Harry C. Westover, Judge, Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

WALTER S. BINNS,
United States Attorney; by
LEILA F. BULGRIN,
Assistant United States Attorney.

For the Defendants:

BERNARD B. COHEN, ESQ.,
HENRY S. COHEN, ESQ.

March 30, 1953—10:00 A.M.

The Clerk: No. 22705, United States v. Finn.

Mrs. Bulgrin: Ready for the Government.

Mr. Cohen: Your Honor, Saturday morning in the mail at 9:00 o'clock, I received a six-page memorandum.

The Court: I received it also, and I think I have read all the cases I want to read with regard to this matter.

Mr. Cohen: May I be heard in regard to the case? [69]

The Court: No. I think I have heard all the argument. I am satisfied in my own mind as to what the law is with regard to the case. Whether or not the Circuit will agree, I don't know, but I am satisfied in my own mind as to what the law is. In this case last week I found that the plane in question had never been taken into custody by the Marshal. The Government wishes me to change that opinion. I can't change the opinion. I can't change the facts of the case. The facts are very evident.

The plane was never in the possession of the government, that is, until after these proceedings were filed. It is in the possession of the government now, as I understand, but it was not under these proceedings. The statutes of the State of California provide several methods in which property can be kept in status quo until title can be determined.

One is by attachment. The other is by garnishment and another is by claim and delivery.

When the statute provides specific remedies such as this, the statute must be strictly complied with. I don't think that the Marshal ever took this plane into his possession.

The statute says personal property must be taken into actual possession. If it is too big, they must

provide a keeper. There is no such thing as constructive possession in claim and delivery, as far as I know. The Marshal never even attempted to pin a notice upon the plane. All he did was take a look at it at from 50 to 75 feet away and then go and tell the custodian of the airport that he had taken it. That doesn't comply with the statute at all.

My ruling last week relative to taking into possession of the plane by the Marshal still stands. The Government never did have possession of the plane.

We come to the next proposition argued by the government relative to the removal of the property from the district while it [70] was in the possession of the court. Well, it never was in possession of the court, never has been in possession of the court. There can't be any contempt proceedings in removing property based on the proposition it was in the possession of the court when it never was in possession of the court. The court never made any order relative to the plane at all. The court never ordered the Marshal to pick up the plane, the court never ordered anybody to pick up the plane. The only order in this case was an order initiated by the District Attorney's office.

The next problem presented to the court was if one is guilty of contempt when he moves property out of the jurisdiction of the court, when the court is then trying to determine the title to the property. In other words, it is the contention of the District Attorney that if an action is filed in the Federal Court in claim and delivery or in any way to determine the title of personal property, it is

contempt if that property is moved out of the jurisdiction of the court.

Well, again I say the statute provides numerous ways in which the property can be held in status quo. It can be held until the title is determined. In this case the government attempted to do that, but didn't do it. I don't think it is the law that if property is in litigation, it is contemptuous if that property is removed. It would be contemptuous if it was in the possession of the court, it would be contemptuous if it was under a writ of attachment, it would be contemptuous if it was held under claim and delivery proceedings.

In other words, if an action was filed in this court to determine the title to the property, no attempt was made by the Government to hold that property, and then the parties moved it out of the jurisdiction of the court, then it is the theory of the government it is contempt. [71]

Well, I have read numerous cases since this case has been before me. I don't know how many. There are certain things that have been impressed time after time by the various courts.

First, this is a criminal proceeding. If this is a criminal proceeding, then the defendants are presumed to be innocent until proven guilty beyond a reasonable doubt. Consequently, if there is a reasonable doubt in my mind, then the defendants must be held not guilty.

Certainly, there is more than a reasonable doubt in my mind that the moving of property out of the jurisdiction of the court while an action has been

filed and no claim has been filed on that property, that is contemptuous.

Then we come to the final argument of the government, and possibly the one that has the most merit. That is whether or not an order made by the court was an order and the defendants violated that order.

When the government came into court relative to the so-called order, it was represented to the court that the plane was then in the possession of the government. If the court had been told that the plane was not in the possession of the government, the court probably would not have made an order relative to interference with the property.

I will say this. I think the District Attorney was of the opinion and was sincere in her statements that the property had been taken over by the government, was in possession of the government, but the facts don't sustain that contention at all.

So we have a problem here. Where property is not in the possession of the government, the government asks for a restraining order restraining the defendants from interfering with the plane. There was no order made. There was a request only made and the statement of the court was, "All right." The question is, is that an order? [72]

Again we come to the question of reasonable doubt. Is there a reasonable doubt that that was an order? I think there is. I think there is a reasonable doubt that there was an order. If there is a reasonable doubt that is an order, then, of course, I will have to hold the defendants Finn are not

guilty of the contempt with which they have been charged.

I want to say to the Finns they have been skating on very thin ice. They have impressed the court on numerous occasions in this proceeding of being willing to determine for themselves what the law is and take the law into their own hands. I am giving them the benefit of the doubt in this case, not because I don't think they should be punished. I really believe they should be punished in some way, but I think the facts in this case are such that there is a reasonable doubt that they are guilty of contempt, and so I am going to make an order now absolving the defendants from contempt.

* * *

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 30th day of March, A.D. 1953.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed September 10, 1953. [73]

[Title of District Court and Cause.]

AMENDMENT TO CROSS-COMPLAINT

(Damages)

Plaintiff hereby amends Cross-Complaint No. 14,309-HW filed September 10, 1953, as follows:

I.

On Page 8, Line 24, Paragraph IV. thereof, delete the words—"Certain Government Officials," and substitute the following:

"Jess Larson, former Administrator, General Services Administration.

"R. E. Minnich, Deputy Chief, General Services Administration.

"T. Lamarr Caudle, former Assistant Attorney General, and certain other government officials."

/s/ CHARLES C. FINN.

Amendment Approved for Filing.

/s/ HARRY C. WESTOVER,
Judge.

Lodged September 11, 1953.

[Endorsed]: Filed September 14, 1953. [74]

[Title of District Court and Cause.]

ANSWER OF SEABOARD SURETY COMPANY, A CORPORATION

Seaboard Surety Company, a Corporation, answers plaintiff's amended complaint on file in the above-entitled matter, as follows:

I.

Alleges that this answering defendant is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, and is authorized to and has been transacting business in the State of California. [75]

II.

That this answering defendant at all times herein mentioned has been engaged in the business of writing surety bonds, replevin bonds and other bonds of similar character.

III.

That on or about the 11th day of March, 1952, defendants, George C. Finn and Charles C. Finn, stated and represented to this answering defendant that they were the owners of the airplane mentioned and described in plaintiff's amended complaint, and relying upon their statement of ownership, and of the fact that the said defendants did actually own said airplane, did write a replevin bond in the Superior Court of Fairfield County, Connecticut. In connection with said application for bond, the said defendants, George C. Finn and Charles C. Finn, did purport to, by written instru-

ment, sell, assign, transfer and set over unto this answering defendant the airplane mentioned and described in plaintiff's amended complaint, as security for the bond hereinbefore mentioned.

IV.

This answering defendant makes no claim to said airplane if the said George C. Finn and Charles C. Finn had no rights thereto. That this answering defendant had no knowledge of the facts alleged in plaintiff's amended complaint, but believed that the said defendants, George C. Finn and Charles C. Finn, were the owners of the airplane described in said amended [76] complaint.

V.

That this answering defendant has never had possession of said airplane, and had no dealings concerning the said airplane other than as herein stated and for the purpose herein set forth.

VI.

This answering defendant denies that it had any interest or took any activity in any manner as to any of the facts alleged in plaintiff's amended complaint, other than as herein set forth, and also denies that it makes any claim to said airplane, other than as herein set forth.

Answer to Plaintiff's Second Cause of Action Set Out in Said Amended Complaint

I.

Answering defendant has not sufficient information or belief to enable it to answer the allegations

contained in Paragraphs I, II, III, IV and V of the second cause of action set out in said complaint, and basing its denial thereon, denies generally and specifically all of said allegations, and each and every part thereof, insofar as they affect this answering defendant only. [77]

Answer to Plaintiff's Third Cause of Action Set Out in Said Amended Complaint

I.

Answering defendant has not sufficient information or belief to enable it to answer the allegations contained in Paragraphs I, II, III and IV of the third cause of action set out in said complaint, and basing its denial thereon, denies generally and specifically all of said allegations, and each and every part thereof, insofar as they affect this answering defendant only.

Answer to Plaintiff's Fourth Cause of Action Set Out in Said Amended Complaint

I.

Answering defendant has not sufficient information or belief to enable it to answer the allegations contained in Paragraphs I and II of the fourth cause of action set out in said complaint, and basing its denial thereon, denies generally and specifically all of said allegations, and each and every part thereof, insofar as they affect this answering defendant only:

Wherefore, answering defendant prays that plaintiff take nothing against this answering defendant; that it have judgment for its costs, and for such other and further relief to which it may be entitled.

WALLACE AND CASHIN,

By /s/ W. W. WALLACE,

Attorneys for Seaboard Surety Company, a Corporation, Defendant.

Duly Verified.

[Endorsed]: Filed September 10, 1953. [78]

[Title of District Court and Cause.]

CROSS-COMPLAINT FOR DAMAGES FOR MISREPRESENTATION AND FOR MONIES LAID OUT AND EXPENDED

Comes now Seaboard Surety Company, a Corporation, and files this, its cross-complaint against cross-defendants George C. Finn and Charles C. Finn, and in support thereof, alleges as follows:

I.

That cross-complainant is a corporation duly organized [80] under and by virtue of the laws of the State of New York; that it is transacting business in the State of California, and in the State of Connecticut, and is duly authorized by the laws of those States to transact business therein.

II.

That cross-complainant is engaged in the business of writing surety bonds of all kinds.

III.

That on or about the 11th day of March, 1952, cross-defendants made an application to cross-complainant to write on behalf of cross-defendants a surety bond, to be filed in the Superior Court of Fairfield County, Connecticut, in an action entitled "George C. Finn vs. Lee Mansdorf and Mallard Industries, Inc.," for the replevin of a certain airplane described in said application; and in order to induce cross-complainant to write said replevin bond, stated and represented to cross-complainant that cross-defendants were the owners of one Curtiss-Wright Airplane C-46, Aircraft Serial Number 1-232, Nationality and Registration Mark N111H, and represented that said airplane was located in the Hangar of International Airports, Inc., at Lockheed Air Terminal, Burbank, California; and said cross-defendants did at said time, by written instrument, purport to grant, bargain, sell, assign, transfer and set over unto cross-complainant the said airplane as security for the replevin bond which cross-complainant was asked to and did write for said cross-defendants in the action then pending in the Fairfield County [81] Superior Court of the State of Connecticut. That cross-complainant believed the representations; that cross-complainant did not know at that time that the said cross-defendants were not the owner of said Curtiss-Wright

airplane, and would not have written said replevin bond had cross-complainant been advised that cross-defendants did not own said airplane, or that the facts as alleged in the amended complaint of the plaintiff in the above-entitled action were true, or that the claims set forth in said amended complaint were then made as to said airplane.

IV.

That cross-complainant is informed and believes, and therefore alleges, that the cross-defendants at all times knew all of the facts set forth in the amended complaint of plaintiff in the above-entitled action, and that they did not have title to said airplane.

V.

That cross-defendants promised and agreed to reimburse cross-complainant for any sums cross-complainant was compelled to pay by reason of the execution of the replevin bond hereinbefore set forth.

VI.

That in said action in the Fairfield Superior Court in the State of Connecticut, a judgment was rendered against the [82] cross-defendants, and by reason of the bond executed and delivered by this cross-complainant, cross-complainant was compelled to and did on October 7th, 1952, pay the sum of $2,945.79.

VII.

That by reason of the misrepresentations of cross-defendants as to their ownership of said airplane,

they secured from cross-complainant said replevin bond, and as a result thereof, cross-complainant has been damaged in the sum of $2,945.79. That said sum has not, nor has any part thereof, been paid.

Wherefore, cross-complainant prays judgment against cross-defendants, and each of them, in the sum of $2,945.79, together with interest thereon at the rate of 7% per annum from October 7th, 1952, until paid; for costs of suit, and for such other and further relief to which cross-complainant may be entitled.

WALLACE AND CASHIN,

By /s/ W. W. WALLACE,

Attorneys for Cross-Complainant Seaboard Surety Company, a Corporation.

It Is So Ordered: Sept. 10, 1953.

/s/ HARRY C. WESTOVER,
Judge.

Duly Verified.

[Endorsed]: Filed September 10, 1953. [83]

[Title of District Court and Cause.]

MOTION TO DISMISS CROSS-COMPLAINT

The Cross-Defendant, United States of America, moves the Court as follows:

1. To dismiss the Cross-Complaint on the ground that the Court lacks jurisdiction over the subject matter thereof.

2. To dismiss the Cross-Complaint on the ground that it fails to state a claim against the Cross-Defendant, United States of America, upon which relief can be granted. [85]

Dated: January 26, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ LOUIS LEE ABBOTT,
Assistant U. S. Attorney; Attorneys for Cross-Defendant, United States of America.

[Endorsed]: Filed January 27, 1954. [86]

[Title of District Court and Cause.]

MINUTES OF THE COURT—AUGUST 26, 1954

Present: Hon. Wm. C. Mathes, District Judge.

Counsel for Plaintiff:
Louis Lee Abbott, Assist. U. S. Atty.

Counsel for Defendant:
Henry S. Cohen.

Proceedings:

Hearing on motion of U.S.A. to dismiss cross-complaint and to strike cross-complaint.

Defendants Finn present an affidavit which is ordered filed.

Attorney Cohen presents a statement in writing requesting the Court to be released from and as counsel for defendants Finn.

The Court orders Attorney Cohen to appear in this case as amicus curiae at all hearings herein.

Attorney Cohen informs the Court that his appearance as ordered by the Court is over his objections, and argues in opposition to motion of the plaintiff to dismiss and to strike cross-complaint of defendants Finn.

Defendant Charles Finn argues in opposition to the motion of the plaintiff to dismiss and to strike cross-complaint.

The Court orders motion of the plaintiff to dismiss cross-complaint granted; with 20 days allowed defendants Finn to file an amended counterclaim.

It Is Ordered that pre-trial hearing set for 9-20-54, vacated and pre-trial hearing reset for 10-25-54, 2 p.m.

A True Copy. Certified this 3rd day of Sept., 1954.

EDMUND L. SMITH,
Clerk. [93]

[Title of District Court and Cause.]

COUNTERCLAIM

Defendants, as a first defense, repeat each and every denial contained in defendants' answer to plaintiff's allegations contained in plaintiff's amended complaint, with the same force and effect as though they were fully set forth herein, and said defendants' answer is made a part hereof.

As and for a Separate and Affirmative Defense to Plaintiff's Allegations Contained in Plaintiff's Amended Complaint, Defendants Allege:

I.

That plaintiff, United States of America, through its agents, seized defendants' property, a C-46A, designated N 111 H, aircraft, without consent of defendants, and without due process of law, in violation of defendants' constitutional rights guaranteed under the Fifth Amendment of the Constitution of the United States of America. [94]

II.

That at all times prior to filing the complaint, plaintiff was informed of the sale of said C-46A Aircraft by Vineland School District to defendants, on February 28, 1951, and plaintiff, on April 14, 1952, through its agency Civil Aeronautics Administration, accepted and filed proof of ownership of said aircraft in defendants, and granted the necessary registration certificate required to fly said air-

craft under the laws of the United States, as a civil aircraft.

III.

That said registration was granted to defendants by plaintiff for the sole purpose of releasing said aircraft from any restrictions that might prohibit the use of the aircraft for flight purposes, and that plaintiff was informed by defendants that, upon acquiring said registration certificate, defendants were authorized to fly said aircraft and would not be obliged to reduce it to its basic material content.

IV.

That plaintiff waived the alleged breach of contract for failing to reduce the aircraft to its basic material content, as set forth in plaintiff's amended complaint, by an amendment to War Assets Administration Regulation 4, appearing in the Federal Register January 3, 1946, and limiting any scrap requirements under Clause 8304.11 (b) to three years after acquisition of the property, per item 8 of the alleged agreement between Vineland School District and plaintiff.

V.

That plaintiff illegally adopted unto its use, the Claim and Delivery statutes of the State of California, Sections 509 to 521, and allegedly seized said aircraft from defendants, and thereby consented to payment of damages resulting from any wrongful seizure or false claim against the property to the extent [95] of twice the value of the

property and thereby guaranteed the same as though a bond had been posted, and plaintiff did libel itself therefor.

VI.

That in an action for contempt of court brought against defendants by plaintiff for removing said property from custodia legis, and possession of the plaintiff, Judge Harry Westover ruled that the said aircraft was never in custodia legis and was not held by plaintiff according to statutes of California, or under any proceeding of Judge Westover's court.

VII.

That plaintiff now holds the said aircraft from defendants without their consent, by force and threat of imprisonment, at the Nellis Air Force Base, Las Vegas, Nevada, outside the territorial jurisdiction of this Court.

As and for a Counterclaim, Defendants Allege:

I.

That plaintiff is now in possession of the property described in plaintiff's amended complaint, claiming title thereto under an alleged breach of contract between plaintiff and Vineland School District, by Vineland School District, and induced by defendants George C. Finn and Charles C. Finn.

II.

That on February 28, 1951, a contract was entered into by Vineland School District and defend-

ants Finn, in which all right, title and interest to said described property, a C-46A aircraft, was transferred to defendants Finn. Subsequently, on April 14, 1952, a Bill of Sale for said property was duly executed and delivered by Vineland School District to defendants Finn, for a consideration of $21,000.00 paid according to a certain contract dated February 28, 1952. Said Bill of Sale and other evidence [96] of title were recorded in the Bureau of Registration, Civil Aeronautics Administration, Washington, D. C.

III.

That plaintiff accepted said Bill of Sale and other evidence of ownership of said aircraft as in defendants Finn, upon granting a certificate of registration of said aircraft, as a civil aircraft.

IV.

That by virtue of said Bill of Sale, and registration certificate N 111 H, defendants are the owners and are entitled to said C-46A aircraft N 111 H.

V.

That as the result of plaintiff's illegal seizure of said aircraft, defendants have and will be denied the use of said aircraft during the pendency of said action, all to their further damage in the sum of $8,000.00 per month.

VI.

That as a result of plaintiff's illegal seizure of said aircraft, and the lack of maintenance by plaintiff, during which time the aircraft was in "dead

storage" unhangared, and exposed to the elements, upon information and belief, defendants allege the aircraft to have deteriorated in value approximately $15,000.00.

VII.

That it has been necessary for defendants to incur costs, expenses and attorney's fees as a result of plaintiff's illegal seizure, and are informed and believe, and therefore allege, will amount to the full sum of $12,000.00.

Wherefore, defendants demand judgment against the plaintiff:

(1) Dismissing the plaintiff's complaint, and that the Court adjudge alleged claims of plaintiff to be invalid [97] and void, that title to said C-46A aircraft be quieted in these defendants, and that they recover possession of their property from the plaintiff in the same condition as when taken from them.

(2) For the sum of $15,000.00 for deterioration of the aircraft if it is not restored to the same condition as when taken upon return of aircraft to defendants.

(3) For the sum of $70,000.00 if property cannot be had.

(4) For the sum of $8,000.00 per month for each month said aircraft was withheld from use of defendants, by plaintiff.

(5) For such other and additional relief as the Court may deem just.

/s/ GEORGE C. FINN,

/s/ CHARLES C. FINN,
Defendants in Pro. Per.

Duly Verified.

[Endorsed]: Filed September 15, 1954. [98]

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCTOBER 11, 1954
At Los Angeles, California.

Present: Honorable Wm. C. Mathes, District Judge.

Counsel for Plaintiff: Louis Lee Abbott.

Defendants: George C. Finn and Charles C. Finn in pro. per.

PROCEEDINGS

For hearing motion of Defendants Finn for an Order requiring Laughlin E. Waters to answer questions propounded in the taking of deposition on Sept. 15, 1954, or to be held in contempt of Court, and

For hearing motion of plaintiff for an order terminating the examination of Laughlin E. Waters commenced on Sept. 22, 1954.

Court Orders motion of Defendants Finn for an questions, etc., denied, and motion of plaintiff for an

Order requiring U. S. Att'y Waters to answer questions, etc., denied, and motion of plaintiff for an Order terminating examination of U. S. Att'y Waters granted.

It Is Ordered that deposition of Defendants Finn, now being taken by Gov't, is terminated, on motion of said Defendants.

It Is Ordered that cross-complaint of Seaboard Surety Co. is dismissed for lack of jurisdiction over the subject matter.

It Is Ordered that cause is set for trial Oct. 26, 1954, 10 a.m.; Gov't to give formal notice to all parties.

EDMUND L. SMITH,
Clerk. [100]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF DEFENDANT INTERNATIONAL AIRPORTS, INC.

Comes Now Defendant International Airports, Inc., and, by leave of court, files this amendment to its Answer:

For a Second, Separate and Affirmative Defense, This Answering Defendant Alleges That:

I.

This answering defendant refers to paragraphs I, II, III, IV, and V of its First Affirmative Defense and by reference makes them a part hereof.

II.

On or about July 10, 1946, plaintiff sold, transferred and delivered to Defendant Vineland School District (Vineland) the C-46 aircraft in suit. Defendant took possession of said aircraft on or about July 25, 1946, and retained such possession until February 28, 1951. [101]

III.

Prior to August 31, 1951, (to wit, about February 28, 1951,) Vineland sold and transferred possession of said aircraft to George C. Finn and Charles C. Finn (the Finns).

IV.

Such sale and transfer of possession was by an agreement in writing with the Finns, a copy of which is annexed to the answer of Vineland herein, marked Exhibit "B." Said Exhibit "B" is incorporated herein by reference. By said Exhibit "B" (1) Vineland transfered to the Finns all of its right, title and interest in and to said C-46 and agreed to execute a "Bill of sale and/or transfer of title" therefor to the Finns; and (2) the Finns did "hereby accept the possession of title of said C-46 * * *"

V.

Vineland executed such bill of sale to the Finns by date of February 28, 1951. A copy thereof is in evidence as part of International's Exhibit "A," and by reference is incorporated herein. Said bill of sale recites in part that Vineland, as the "owner of the full legal and beneficial title" of said aircraft, does "hereby sell, grant, transfer and de-

liver all of his right, title and interest in and to such aircraft unto "the Finns, andVineland therein certifies that said aircraft is "not subject to any mortgage or other encumbrance."

VI.

Said bill of sale was presented to the Civil Aeronautics Administration (CAA) in Washington, D. C., on about April 16, 1951, for the purpose of registration pursuant to the provisions of the Civil Aeronautics Act of 1938, as amended (49 U.S.C. Sec. 501, et seq.). The CAA was well aware that said C-46 aircraft was one disposed of by the United States to Vineland under the provisions of the Surplus Property Act of 1944 and Regulation 4 thereunder. Said CAA further was well aware of the provisions [102] of a certain War Assets Administration Form 65 agreement claimed by the United States to be applicable to said aircraft.

VII.

At or about the date last mentioned certain officials of the CAA inquired of certain officials of the Federal Security Administration, and otherwise, concerning the existence, if any, of restrictions upon the ownership by Vineland of said aircraft, and its sale to the Finns. Said officials, acting in the exercise of their official duties or with the knowledge and consent of other officials so empowered to act, waived and released said restrictions and consented to the registration of said aircraft by the Finns, and the issuance to them on April 16, 1951, by the administrator of Civil Aeronautics of a Certificate

of Registration for said aircraft. A copy of said Certificate of Registration is in evidence as part of International's Exhibit "A."

VIII.

Such consent to the registration aforesaid was reasonably calculated to, and did, induce members of the public, including this answering defendant, to believe that the Finns had first submitted to CAA a genuine bill of sale from Vineland, and that there was no reason, insofar as plaintiff was concerned, why Vineland's transfer of title to the Finns should not be given effect.

IX.

Further, by the facts recited in paragraph II hereof, plaintiff represented to the world that Vineland was the owner of said airplane.

X.

By the facts recited in paragraph III, Vineland represented to the world that the Finns were the owners of said airplane.

XI.

Defendant International Airports, Inc., relied and had a [103] right to rely upon the representations aforesaid, and so relying, loaned the money and did the things described in its first affirmative defense herein.

XII.

By reason of the foregoing, Plaintiff has waived its rights, if any, in said aircraft and ought not

be permitted to deny as against Defendant International Airports, Inc., that Vineland had full title to said aircraft, and Vineland ought not be permitted to deny that it transferred title to the aircraft to the Finns.

Wherefore, this answering defendant prays that plaintiff take nothing as against this answering defendant; that the interests, and each of them, of said defendant as herein set forth be recognized and protected as against any claims herein alleged by plaintiff; and for such other and further relief as to the court may seem just.

/s/ A. J. BLACKMAN,
Attorney for Defendant
International Airports, Inc.

Receipt of copy acknowledged.

Lodged November 2, 1954.

[Endorsed]: Filed November 5, 1954. [104]

[Title of District Court and Cause.]

SPECIAL VERDICT

[Fed. R. Civ. P. 49 (a)]

We, the jury in the above-entitled cause, unanimously find as follows:

Interrogatory (1)

At the time of the making of the agreement between Vineland Elementary School District and

defendants Finn on February 28, 1951, [see Vineland's Exhibit B], did defendants Finn, or either of them, have either knowledge or notice that the plaintiff, United States of America, Claimed restrictions upon the use or sale of the airplane in suit [see plaintiff's Exhibit 1]?

Finding of the Jury ["Yes or No"]: Yes. **[106]**

Interrogatory (2)

Did defendant Vineland Elementary School District intend to transfer title to the airplane in suit to defendants Finn at any time before all necessary consents and releases and waivers of the Government had been procured?

Finding of the Jury ["Yes" or "No"]: No.

Interrogatory (3)

Did defendants Finn intend to induce defendant Vineland Elementary School District to breach any agreement between the Government and the School District [see plaintiff's Exhibit 1]?

Finding of the Jury ["Yes" or "No"]: No.

Interrogatory (4)

Did defendant Peter Bancroft intend to induce defendant Vineland Elementary School District to breach any agreement between the Government and the School District?

Finding of the Jury ["Yes" or "No"]: No.

Interrogatory (5)

At what time or times during the period from February 28, 1951, until October 26, 1951, were defendants Finn, or either of them, in actual possession of the airplane in suit?

Finding of the Jury [State date or dates]:
Oct. 23, 1951.

Interrogatory (6)

At what time or times during the period from February 28, 1951, until October 26, 1951, were defendants Finn, or either of them, in constructive possession of the airplane in suit?

Finding of the Jury [State date or dates]:
February 28, 1951, to Oct. 23, 1951.

Interrogatory (7)

At the time when physical possession of the airplane in suit was given to defendants Finn, did defendant Peter Bancroft and defendant Vineland Elementary School District intend that such possession be for the sole purpose of enabling work to be done on the aircraft which could not be done on the school grounds?

Finding of the Jury: ["Yes" or "No"]:
Yes. [107]

Interrogatory (8)

At the time on August 31, 1951, when defendant International Airports, Inc., advanced $15,000 to

defendants Finn, did International Airports, Inc., in good faith believe that defendants Finn were the true and lawful owners of the airplane in suit?

Finding of the Jury ["Yes" or "No"]: Yes.

Interrogatory (9)

Did defendant, International Airports, Inc., in good faith believe that defendants Finn were the true and lawful owners of the airplane in suit during the period after August 31, 1951, when International Airports, Inc., performed labor and furnished materials of the value of $10,200 for the repair and improvement of the aircraft?

Finding of the Jury: ["Yes" or "No"]: Yes.

Interrogatory (10)

Did defendant, International Airports, Inc., have either knowledge or notice of the existence of interests and claims of defendant Vineland Elementary School District to the aircraft in suit under the agreement between the School District and defendants Finn [see Vineland's Exhibit B] at the time International Airports, Inc., advanced the sum of $15,000 to defendants Finn [see International's Exhibits B, C, E, F and G]?

Finding of the Jury: ["Yes" or "No"]: Yes.

Interrogatory (11)

Did defendant, International Airports, Inc., have either knowledge or notice of the existence of interests and claims of defendant Vineland Elementary

School District to the aircraft in suit under the agreement between the School District and defendants Finn, at the time International Airports, Inc., performed labor and furnished materials of the value of $10,200 for the repair and improvement of the aircraft?

Finding of the Jury: ["Yes" or "No"]: Yes.

Interrogatory (12)

Did defendant, International Airports, Inc., have either knowledge or notice, on August 31, 1951, when International Airports, Inc., advanced $15,000 to defendants Finn, that the plaintiff, United States of America, claimed restrictions upon the use or sale of the airplane in suit [see defendant International's Exhibit A and plaintiff's Exhibit 1]?

Finding of the Jury: ["Yes" or "No"]: Yes. [108]

Interrogatory (13)

Did defendant, International Airports, Inc., have either knowledge or notice that the plaintiff, United States of America, claimed restrictions upon the use or sale of the airplane in suit at any time during the period after August 31, 1951, when International Airports, Inc., performed labor and furnished materials of the value of $10,200 for the repair and improvement of the aircraft?

Finding of the Jury: ["Yes" or "No"]: Yes.

Interrogatory (14)

Have Government restrictions as to sale and use of the airplane in suit ever been released by any authorized representative of the Federal Security Agency?

Finding of the Jury: ["Yes" or "No"]: No.

Interrogatory (15)

Have Government restrictions as to sale and use of the airplane in suit ever been waived by any authorized representative of the Federal Security Agency?

Finding of the Jury: ["Yes" or "No"]: No.

Interrogatory (16)

What was the fair market value in cash, of the airplane in suit on July 25, 1946, at the time of delivery of the aircraft by the War Assets Administration to the Vineland Elementary School District [see plaintiff's Exhibit 4]?

Finding of the Jury: $5,000.00

Interrogatory (17)

What was the fair market value, in cash, of the airplane in suit on February 28, 1951, at the time of the making of the agreement between Vineland Elementary School District and defendants Finn [see Vineland's Exhibit B]?

Finding of the Jury: $20,000.00

Interrogatory (18)

What was the fair market value, in cash, of the airplane in suit during the period February 28, 1951, to October 26, 1951?

Finding of the Jury: From $20,000.00 to $25,000.00. [109]

Interrogatory (19)

What was the fair market value, in cash, of the airplane in suit on April 14, 1951, at the time of the delivery of the bill of sale from Vineland Elementary School District to defendants Finn [see plaintiff's Exhibit 5]?

Finding of the Jury: $25,000.00

Interrogatory (20)

What was the fair market value in cash, of the airplane in suit on July 3, 1952, at the time of the commencement of this action or suit by the United States of America as Plaintiff against the defendants?

Finding of the Jury: $50,000.00

Los Angeles, California, November 5, 1954.

/s/ FRANK T. STRIKER,
Foreman of the Jury.

[Endorsed]: Filed November 5, 1954. [110]

[Title of District Court and Cause.]

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW

* * *

VII.

Remedies

The primary contention of the Government in this action is that it has had title and the right to possession of the airplane in suit from February 28, 1951, to the present date. Plaintiff has in this and prior memoranda of law asserted that the status of the Government is that of a bailor after breach of a material condition of bailment or, in the alternative, that of a grantor who has conveyed property subject to a right of reverter after occurrence of the condition of reverter. In so arguing, the Government has asserted that while the legality of the transactions between the Vineland Elementary School District and the defendants Finn may be material to determining property rights as between those parties, questions of compliance with the California Education Code are not material to a finding of breach of the conditions of bailment, or occurrence of the condition of reverter. By failing to perform its affirmative duties created by the Agreement, the School District has permitted occurrence of the conditions terminating whatever interest it may have had in the airplane in suit.

The relief sought by plaintiff in the event that the Court adopts either of the above "title" theories is an adjudication that it is and has been since February 28, 1951, the owner of and entitled to the possession of the airplane in suit. Plaintiff also seeks damages for wrongful detention during the period commencing February 28, 1951, and ending September 18, 1952.

If the Court rejects the Government's title theories, but adjudicates that as between Vineland and the other defendants, Vineland is the owner of the airplane in suit and entitled to the possession thereof, then the Government prays for appropriate relief by equitable decree enjoining all defendants from further violation of the terms and conditions of the Agreement (plaintiff's [128] Exhibit 1). For the reasons stated in Paragraph IV above, the Government further submits that specific performance of the terms and conditions of plaintiff's Exhibit 1 may be decreed as against all parties to this action even if some party other than the Government or the Vineland Elementary School District is determined to be the owner and entitled to possession of the airplane in suit. In short, the Government seeks to specifically enforce plaintiff's Exhibit 1 as against all parties regardless of the determination of rights as between the several defendants, in the event that the Government is not declared to be the owner and entitled to possession of the airplane in suit. [Rule 54 (c), Federal Rules of Civil Procedure.]

The Government also seeks damages for breach of the terms of plaintiff's Exhibit 1 as against the defendant Vineland Elementary School District, and also as against the defendants Finn. In the event that the Court determines that title and right to possession is in some party other than the Government or the Vineland Elementary School District, damages properly recoverable for breach and inducement to breach are equal to the fair market value of the airplane at the time of the purported sale from Vineland to the defendants Finn. If the Court orders return of the aircraft in suit to the defendant Vineland Elementary School District and further decrees that hereafter all parties shall be enjoined from conduct inconsistent with the terms and conditions of the Agreement, plaintiff's Exhibit 1, the Government has nevertheless been damaged by breach of the provisions of that instrument to the extent that it has been deprived of the educational benefit to be derived from the use of the airplane in suit by Vineland during the period from October 23, 1951, to date. In the latter contingency the Government would pray for damages in a sum to be fixed by the Court in the exercise of its discretion, and suggests that such damages would in no event be less than interest [129] on the value of the aircraft for the period during which it has been diverted from educational use.

Just as Vineland's argument that its transactions with the defendants Finn were void under Cali-

fornia law are not material to determination of whether there has been a termination of bailment or occurrence of the condition of reverter, so also must that claim of illegality fail when asserted as a defense to the Government's cause of action for breach of contract. The School District may not have sold anything to the Finns because it did not comply with California law; it nevertheless has failed to comply with its affirmative covenants including the covenant to use the airplane in suit for non-flight instructional purposes by a tax-supported educational institution.

In the event that the Court sees fit to order return of the airplane in suit to the Vineland Elementary School District, the Government submits that all costs incident to preparation of the airplane for flight and its actual removal from the Nellis Air Force Base to Vineland, should be borne by the Vineland Elementary School District and that the judgment of the Court should so provide. Only by reason of Vineland's own wrongful act is the airplane today at a point distant from the District.

With respect to the Counterclaim of the defendants Finn, the Government asserts that it has had title to and the right to possession of the airplane in suit at all times since February 28, 1951; that as between the defendant Vineland and the defendants Finn, the defendant Vineland has a superior claim to title and possession of that aircraft; and that for either or both of those reasons no recovery on

the counterclaim may be had. Should the Court rule adversely to the Government with respect to each of the propositions last stated, the defendants Finn would nevertheless be precluded from recovering damages for retention of the airplane during the period in which it has been in the [130] possession of the Government subsequent to September 18, 1952, since the uncontradicted evidence in this cause demonstrates that as between the defendants Finn and the defendant International Airports, Inc., the defendant International Airports, Inc., has had the right to possession of the airplane in suit at all times from a date prior to September 18, 1953, to the present date.

Plaintiff attached a copy of the Opinion of the United States District Court for the Eastern District of Michigan, Southern Division, in United States v. School District No. 2, et al., No. 11007, to Plaintiff's Memorandum of Law filed October 5, 1954. A certified copy of that Opinion, together with certified copies of the Judgment and of the Findings of Fact and Conclusions of Law are filed herewith. Copies of each of the said documents have been served upon all counsel and parties not represented by counsel.

Plaintiff attached a copy of the Opinion of the Superior Court of Fairfield County, Connecticut, in George C. Finn v. Mansdorf, et al., to plaintiff's Reply Memorandum of Law, filed November 3, 1954. A certified copy of that Opinion is filed herewith.

Copies of the Opinion have been served upon all counsel and parties not represented by counsel.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant United States Attorney, Chief, Civil Division;

/s/ LOUIS LEE ABBOTT,
Assistant United States Attorney, Attorneys for Plaintiff.

[Endorsed]: Filed November 15, 1954. [131]

[Title of District Court and Cause.]

STIPULATION OF DISCLAIMER AND FOR JUDGMENT

Come Now the plaintiff, United States of America, and the defendant, Seaboard Surety Company, a Corporation, and stipulate as follows:

1. That the defendant, Seaboard Surety Company, disclaims any right, title or interest in or to the airplane in suit, to wit: a C-46A Curtiss Commando airplane, United States Army Serial No. 42-3645, Manufacturer's Serial No. 1-232, Civil Aeronautics Administration Registration No. 111H.

2. That the judgment of this Court herein may include a declaration that the defendant, Seaboard

Surety Company, has no right, title or interest in or to the said airplane in suit.

3. That the judgment of this Court herein may provide that plaintiff shall not recover costs as against the defendant, Seaboard Surety Company, and that the defendant, Seaboard Surety [151] Company, shall not recover costs as against the plaintiff.

Dated: November 30, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant United States Attorney, Chief of Civil Division;

/s/ LOUIS LEE ABBOTT,
Assistant United States Attorney, Attorneys for Plaintiff, United States of America.

WALLACE & CASHIN,

By /s/ A. W. WALLACE,
Attorneys for Defendant Seaboard Surety Company, a Corporation.

The above Stipulation is approved, this 1st day of December, 1954.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed December 2, 1954. [151-A]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Mathes, District Judge:

The United States sues for declaratory relief [28 U.S.C. §§1345, 2201-2202], breach of contract, and claim and delivery [Calif. Code Civ. Proc. §§509-521; Fed. Rules Civ. Proc., Rule 64, 28 U.S.C.A.], alleging the Government to be "the owner and * * * now entitled to the immediate possession of a certain C-46A Curtiss-Commando airplane bearing United States Army serial number 42-3645." [C.A.A. Reg. No. 111 H; 58 Stat. 765, 50 U.S.C.A. App. [152] §§1611-1646; 40 U.S.C. §§471-492.] Plaintiff also seeks damages from defendant Vineland Elementary School District for breach of contract, and from defendants Finn and Bancroft for inducing breach of contract.

After World War II the War Assets Administration was engaged in the disposal of war-surplus aircraft and, to effect the greatest public use of such aircraft, gave preference to public bodies and educational institutions such as defendant Vineland Elementary School District near Bakersfield, California. In June and July of 1946 defendant School District evidenced an interest in acquiring one of these war-surplus aircraft, and possession of the C-46A transport airplane in suit was transferred to the School District on July 25, 1946, by virtue of a "Release of Custody" executed pursuant to an "Agreement" [W.A.A. Form 65] signed a month

earlier. Defendant School District paid the Government a cash consideration of $300, and thereafter used the airplane as a classroom for over four years.

In 1950 defendants Finn desired to acquire the airplane from the School District and offered cash and certain labor and materials in exchange for it. Defendant School District published an invitation for bids and, defendants Finn being the only bidders, on February 28, 1951, defendant Bancroft, the Superintendent of Schools, transferred possession of the airplane to defendants Finn. [153]

Thereafter defendants Finn, following negotiations in Washington with officials of the War Assets Administration and the Civil Aeronautics Administration, procured the issuance in their names by the C.A.A. of a certificate of ownership of the aircraft.

Because the airplane needed substantial repair before it could be considered airworthy, defendants Finn had defendant International Airports, Inc., do the necessary work. On August 31, 1951, defendants Finn, as mortgagor, and defendant International, as mortgagee, executed a chattel mortgage on the airplane as security for a loan of $15,000. On the same date and as part of the same transaction, defendants Finn leased the airplane to defendant International.

By virtue of the provision of Rule 64 of the Federal Rules of Civil Procedure, the Government invoked the summary procedure known in the law of California as "Claim and Delivery of Personal

Property" [Calif. Code Civ. Proc. §§ 509-521], and thereby was enabled to cause the Marshal of this Court to seize possession of the aircraft in suit prior to trial. [Id. §§ 511-512, 518, 521.] The seizure took place on September 15, 1952, and the Government has been in possession of the aircraft since that date. **[154]**

Defendant Seaboard Surety Company filed a disclaimer of any interest. The remaining defendants answered and asserted claims prior to those of the Government. Defendants Finn filed a counterclaim for damages for the Government's alleged wrongful seizure and detention of the aircraft.

These are the facts in brief. The demand of defendants Finn for a jury trial having been tardily filed, an advisory jury was empaneled. [Fed. Rules Civ. Proc., Rules 38(b), 39(c), 28 U.S.C.A.] Upon the close of the evidence, a form of special verdict comprising twenty interrogatories was submitted to the jury. The unanimous findings of the jury in answer to the interrogatories will be adopted as findings of the Court, and are appended hereto.

The Government's claim of ownership and for breach of contract depend on the documents signed by the various parties as governed by the applicable statutes and regulations. The claim of ownership will be discussed first.

At the time of the transaction between the Government and defendant School District, the Surplus

Property Act of 1944 provided in part: "Disposal to local governments and nonprofit institutions * * * The [Surplus Property] Board shall prescribe regulations for the disposition of surplus property to States and their political subdivisions [155] and instrumentalities, and to tax-supported and nonprofit institutions * * * In formulating such regulations the Board shall be guided by the objectives of this Act and shall give effect to the following policies to the extent feasible and in the public interest: (1) (A) Surplus property that is appropriate for school, classroom, or other educational use may be sold or leased * * * [58 Stat. 770, 50 U.S.C.A. App. § 1622(a) 1944.]

The applicable regulation then provided in part that: "The disposal agency shall compile a list of such items and shall ascertain fixed prices * * * The disposal agency is authorized to dispose of such property to educational or public-health institutions or instrumentalities at the prices so approved * * * [T]he property will not be resold to others within three years * * *" [32 C.F.R. 1946 Supp. §8304.11.] [Emphasis added.]

In determining, first of all, the nature of the interest in the airplane acquired by defendant School District the intention of the parties as disclosed by the documentary evidence must be noted. The War Assets Administration, in its form sheet of instructions addressed to the School District, outlines in Instruction III "How to Purchase," and refers in Instruction VI to the "Price" of the

airplanes. [U.S. Govt. Printing Office 16-47792-1.] Moreover the quoted [156] regulation itself refers to "prices" and "resold." [32 C.F.R. 1946 Supp. § 8304.11.] Defendant Bancroft filled out a "Purchase Order" [W.A.A. Form 66] on June 25, 1946. On July 10, 1946, the War Assets Administration issued a "Sales Receipt" which mentions "purchases" in the name of defendant School District, and the "price." [WAA-LA-12.]

The authority of the War Assets Administration to pass title is made clear by the above-quoted provisions of the statute that: "Surplus property * * * appropriate for school, class-room, or other educational use may be sold or leased * * *" [58 Stat. 770; 50 U.S.C.A. App. § 1622(a)(1)(A)(1944).]

But most important, at the time the airplane was delivered to defendant School District, a sale was the only permissible method of disposal; for the regulation then provided: "[A]fter June 30, 1946, transport aircraft shall be disposed of only by sale." [32 C.F.R. 1946 Supp. § 8304.7.] Interpreted in the light of the statute and the regulation, the documentary evidence compels the conclusion that in 1946 full title to the airplane in suit was transferred by the War Assets Administration to Vineland Elementary School District.

The contention is made, however, that violation by defendant School District of restrictions upon use and disposal [157] of the aircraft caused title to revert to the Government. Form 65 contains no reservation of power in the Government to revest

title to the property, nor any provision that title will automatically revest on violation of the restrictions. Moreover restrictions upon title which restrain alienation and use are not favored by the law. [See: Davis v. Gray, 16 Wall. (83 U.S.) 203, 230 (1872); Los Angeles University v. Swarth, 107 Fed. 798, 803 (9th Cir. 1901).] So where, as here, there are "no express terms creating a condition, no clause of re-entry nor words of any sort indicating such purpose, the conclusion is unavoidable that the obligation in question is a covenant * * *" [Columbia Railway, etc., Co. v. South Carolina, 261 U.S. 236, 248, 250 (1923)] for the breach of which damages would be the only remedy. [See: United States v. Michigan, 190 U.S. 379 (1903); Northern Pacific Railway v. Townsend, 190 U.S. 267 (1903); Emigrant Co. v. County of Adams, 100 U.S. 61, 71 (1870).]

It is conceded that defendant School District on February 28, 1951, by a C.A.A. form bill of sale signed by defendant Bancroft, did "hereby sell, grant, transfer, and deliver [to defendants Finn] all of * * * [its] right, title, and interest in and to such aircraft * * *" Earlier, on October 9, 1950, defendant Bancroft had signed a "Bill of Sale" which was typed on the letterhead stationery of the [158] School District and, referring to the rules and regulations of the W.A.A., declares: "We hereby sell * * *" These documents show a plain intention on the part of defendant School District to pass title to the airplane to defendants Finn.

It is urged nonetheless that the sale to defendants Finn is void because the consideration included labor and materials as well as cash. The applicable California statute provides in part that the "board of any school district may sell * * * for cash * * *" [Cal. Ed. Code § 19801.] This statute is permissive only; the auxiliary verb "may" does not limit the authority conferred to cash sales. It follows that at least as early as February 28, 1951, defendant School District passed valid title to defendants Finn.

On May 28, 1952, defendant International Airports, Inc., commenced an action in the Superior Court of the State of California, in and for the County of Los Angeles, for claim and delivery of the airplane; and on June 9, 1952, defendant International filed in the State Court an action for foreclosure of the chattel mortgage. Defendants Finn answered the complaints, and counterclaimed that defendant International had failed to lend additional funds as required by the agreement and had failed to pay agreed rentals under the lease. The two cases were consolidated for trial and the State Court rendered [159] judgment in favor of defendant International. An appeal from this judgment is now pending.

In keeping with the well-founded policy that litigants may try their causes but once, this Court in its discretion will leave final determination of the controversies between defendants Finn and International Airports to the State courts, since a

determination of those claims is not essential to decision of the other claims at bar. [See: Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937); Highway Ins. Underwriters v. Nichols, 85 F. Supp. 527 (E.D. Okla. 1949); Veeder-Root, Inc., v. Henrietta, 52 F. Supp. 918 (D. Conn. 1943).]

To decide plaintiff's claim here it is sufficient to hold that the Government has neither right to possession of nor valid claim of title to the airplane in suit.

The alleged breach and inducing breach of contract are next to be considered. At the time of the sale to defendant School District, the relevant regulation governing disposal of surplus airplanes provided in part: "The disposal agency shall establish procedures pursuant to which educational * * * institutions or instrumentalities may make written application for surplus aeronautical property available for disposal * * * Such procedures shall include * * * (2) a certification [160] of the purposes for which the property is to be acquired, and in the case of aircraft an agreement that it will not be flown except for purposes of research or experiment in connection with the science of aeronautics, and (3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap." [32 C.F.R. 1946 Supp. § 8304.11(b).]

The printed Form 65 used by plaintiff to set forth the agreement between the Government and defendant School District did not contain the restrictions of the regulation just quoted, but contained instead the terminology of a superseded regulation. [See: 10 F.R. 10362, 5460, § 8304.4(e) (1945).] The result is that Form 65, as executed by the Government and defendant School District, provides in parts "Vineland Elementary School District * * * hereby certifies and agrees as follows * * * (6) That the acquired property will not be used for any actual flight purposes. (7) That all acquired property, when unfit for the above purpose, will be sold only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content. Sales consummated within three years of the date of acquisition must have the prior approval of the [161] Disposal Agency."

Thus Form 65, as executed, prohibits entirely all flight use, whereas subsection (2) of the applicable regulation then permitted both research and experimental flight. Moreover the restrictions as to disposal contained in Form 65 are without limit in point of time, whereas subsection (3) of the amended regulation limits restrictions upon disposal to the period of three years next following purchase.

Clearly, then, the restrictions as to disposal and use in Regulation § 8304.11(b)(2),(3) and those set

forth in the executed Form 65 are contradictory and cannot stand together. The language of the regulation being mandatory, and having the force of law to the extent authorized by the statute, must control. [United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); see: United States v. San Francisco, 310 U.S. 16, 30 (1940); Ashwander v. T.V.A., 297 U.S. 288, 338, (1936); United States v. Weisbrod, 202 F. 2d 669 (7th Cir. (1953)).]

This conclusion requires that, if valid, subsection (2) of Regulation § 8304.11(b) must be read into Form 65 in lieu of the above-quoted agreement (6) of Form 65 as executed here. The result follows that defendant School District and the Government agreed that the airplane in suit "will not be flown except for purposes of research or [162] experiment * * *"

This holding is buttressed by the settled rule that a valid administrative regulation binds the administrator himself equally with others [United States ex rel. Accardi v. Shaughnessy, supra, 347 U.S. 26; Chapman v. Sheridan-Wyoming Co., 338 U.S. 621, 629 (1950); Bridges v. Wixon, 326 U.S. 135, 153 (1945); see Jeffries v. Olesen, 121 F. Supp. 463, 476 S. D. Cal. 1954)], the same as though the provisions of the regulation were prescribed in terms by the statute. [Atchison, T. & S. F. Ry. v. Scarlett, 300 U.S. 471, 474 (1937).]

Assuming now that subsection (2) of the quoted regulation restricting flight of surplus aircraft was intended to remain effective beyond the three-

year period specified in subsection (3), and so serve as a sort of covenant running with the aircraft, the question is confronted whether such limitations upon use are authorized by the statute—i.e., whether the regulation is valid.

Throughout the Act broad authority to promulgate regulations is conferred, but the Congress expressly directed that the formulation of regulations "shall be guided by the objectives of this Act." [58 Stat. 770, 50 U.S.C.A. App. § 1622 (1944).]

Included in the "Declaration of general objectives" [163] of the Act are these: "* * * (b) to give maximum aid in the re-establishment of a peacetime economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment; * * * (d) to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise; * * * (f) to afford returning veterans an opportunity to establish themselves as proprietors of * * * enterprises; * * * (p) to foster development of new independent enterprise; * * * [and] (s) to dispose of surplus Government-owned transportation facilities and equipment in such manner as to promote an adequate and economical national transportation system * * *" [58 Stat. 766, 50 U.S.C.A. App. § 1611 (1944).]

It is seen that the stated objectives of the Act are replete with references to "free independent

private enterprise," "independent operators," "small business concerns," "afford[ing] returning veterans an opportunity * * * as proprietors," and "new enterprises." Defendants Finn wanted to do these very things; their objective was to operate the airplane in suit themselves as a new and independent and free private enterprise. [164]

The provision of subsection (2) of Regulation § 8304.11(b), prohibiting flight of the airplane "except for purposes of research or experiment" runs directly counter to the Congressional objectives expressed in the statute. Being contrary to, rather than in accordance with, "the provisions * * * [and] objectives of this Act," the regulatory provision in question is invalid. Comparable provisions of Form 65 are pari ratione invalid as well.

Like considerations of reason and policy raise doubts also as to the validity of the limitations on disposal contained in above-quoted subsection (3) of the regulation, but it is not necessary to resolve them here. The three-year restriction on unfettered disposal having expired at the time of the sale to defendants Finn, the School District was free to sell the aircraft as such without violating the provisions of subsection (3) of the regulation. [See United States v. School District, et al., No. 11007 (E.D. Mich. 1954).]

The jury found that defendants Finn and Bancroft did not intend to induce a breach of the contract; neither did they induce one. The School District's agreement in Form 65, as read in the

light of the quoted regulation, was not breached by sale of the airplane to defendants Finn. [165]

There remains for determination the counterclaim of defendants Finn for loss of use from the time possession of the aircraft was seized at the suit of the Government on September 15, 1952, and for the full value of the airplane in the event the Government does not return it.

This counterclaim is compulsory in character, since "it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." [Fed. Rules Civ. Proc., Rule 13(a), 28 U.S.C.A.] Accordingly, federal jurisdiction over the subject matter need not rest upon independent grounds, but may be grounded upon jurisdiction over the subject matter of the main suit. [See: Moore v. New York Cotton Exchange, 270 U.S. 593, 609 (1926); American Mill Co. v. American Surety Co., 260 U.S. 360, 364 (1922); Texas Co. v. Bourne, etc., Co., 68 F. 2d 104, 106 (4th Cir. 1938); Cooling Tower Co. v. Brann & Co., 1 F. 2d 178 (9th Cir. 1924); Hartley Pen Co. v. Lindy Pen Co., 16 F.R.D. 141 (S.D. Cal. 1954).]

Sovereign immunity, both as to liability and as to suit [cf. Hopkins v. Clemson Agricultural College, 221 U.S. 636, 646 (1911)], has been impliedly waived by the act of the Government in bringing the action, thereby voluntarily submitting pars pro toto all controversies [166] involved, including compulsory counterclaims, to the jurisdiction of this

ists independently of the Constitution and statutes. [United States v. Land, supra, 44 F.Supp. at 715; see James v. Dravo Contracting Co., 302 U. S. 134, 137 (1937).]

As said in United States v. General Motors Corp., 323 U.S. 373, 378 (1945), "Property * * * denote[s] the group of rights in the citizen's relation to the physical thing, as the right to possess, use, and dispose of it. * * * The constitutional provision is addressed to every sort of interest the citizen may possess." [Emphasis added.]

The Government took possession of and prevented use or disposition of the airplane by others; thus, it has taken for the as-yet-undetermined period of detention the "group of rights" of which the "property" is comprised.

It is for the courts to decide whether the use is in fact a public use [Shoemaker v. United States, 147 U.S. [169] 282, 298 (1893)], and the Supreme Court has just observed that "The concept of public welfare is broad and inclusive." [Berman v. Parker, 348 U.S. (November 22, 1954).] Here it was a substantial benefit to the public to have the airplane under Government control pending adjudication of its claims. A judgment might be of little value if the airplane were not available for satisfaction. [Cf. Nat. Union Marine Cooks v. Arnold, 348 U.S. (November 22, 1954).]

It follows that "just compensation" must be provided for the loss of use. [See Rank v. Krug, 90

F.Supp. 773, 786 (S.D. Cal. 1950).] "Such compensation means the full and perfect equivalent in money of the property taken." [United States v. Miller, 317 U.S. 369, 373 (1943).]

Under the circumstances here the constitutional requirement of "just compensation" is met by holding the Government liable, as would be a private citizen under the law of California, for all damages proximately resulting from wrongful seizure and detention of personal property. [28 U.S.C. § 2674; Cal. Code Civ. Proc. § 667; Nahhas v. Browning, 181 Cal. 55, 183 Pac. 442 (1919); cf. 28 U.S.C. §§ 2674, 2680; United States v. Miller, supra, 317 U.S. at 380.]

Defendants Finn have been wrongfully deprived of the possession and use of the airplane, the fair market [170] value of the use of which in the condition in which found at the time of seizure on September 15, 1952, was and now is the sum of $15 per day.

The fair market value of the aircraft itself at the date of commencement of this action on July 3, 1952, has been found by the jury to be $50,000. Adopting this finding, the court will fix $50,000 as the fair market value of the airplane at the time the Government seized possession on September 15, 1952.

Judgment will be ordered in favor of all defendants dismissing the Government's complaint on the merits. Judgment also will be ordered in favor of defendants Finn on their counterclaim (1) requir-

ing the Government to restore to them possession of the aircraft in suit, at Scotty's Air Strip in the State of Nevada, in the same order and condition as when the Government seized possession on September 15, 1952, ordinary wear and tear excepted; or (2) in the alternative, to pay to defendants Finn the sum of $50,000 as the fair market value of the airplane [see 28 U.S.C. § 2412]; and (3) in either event, to pay to defendants Finn the fair market rental value of $15 per day from September 15, 1952, until either the aircraft shall have been delivered into the possession of defendants Finn [171] or their agents, successors or assigns, as provided in (1) above, or until the sum of $50,000 shall have been paid, as provided in (2) above.

All adjudications in favor of defendants Finn will be made subject and without prejudice to any prior rights of defendant International Airports, Inc., which may now exist or be hereafter adjudicated in the State courts.

Defendants will lodge with the Clerk within ten days findings of fact, conclusions of law, and judgment accordingly, to be settled pursuant to local rule 7.

[Endorsed]: Filed December 8, 1954. [172]

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Plaintiff, United States of America, replies to the matters alleged by way of counterclaim commencing at line 17 of page 3 of the pleading entitled "counterclaim," filed September 15, 1954, and served October 20, 1954, by the defendants George C. Finn and Charles C. Finn. This reply is not directed to matters alleged by way of affirmative defense at line 24 of page 1, through line 15 of page 3, of said pleading.

I.

Answering paragraph I, commencing at line 19, of page 3, of the Counterclaim, plaintiff admits that it is in possession of the property described in plaintiff's Amended Complaint, which property is more particularly identified as a C-46A Curtiss Commando airplane, United States Army Serial No. 42-3645, Manufacturer's Serial No. 1-232, Civil Aeronautics Administration Registration No. 111H. Plaintiff further admits that it claims title to the said property, and that it also claims that there has been a breach of a contract [173] between plaintiff and the defendant Vineland Elementary School District, which contract is more particularly identified in this cause as Plaintiff's Exhibit 1, Agreement, dated June 25, 1946, and that said breach of contract has been induced by the defendants George C. Finn and Charles C. Finn. Further answering said paragraph I, plaintiff denies each and every

allegation contained therein except insofar as said allegations have been expressly admitted above.

II.

Answering paragraphs II, III, IV, V, VI, and VII, commencing at line 25, of page 3, of the Counterclaim, plaintiff denies each and every allegation contained therein. Further answering said paragraphs, V, VI, and VII, plaintiff denies that the defendants George C. Finn and Charles C. Finn, or either of them, has been damaged in the sum of $8,000 per month, or in the sum of $15,000, or in the sum of $12,000, or in any sum whatsoever, or at all.

Wherefore, Plaintiff prays that the defendants, George C. Finn and Charles C. Finn, take nothing by way of the Counterclaim on file herein.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ LOUIS LEE ABBOTT,
Assistant United States Attorney; Attorneys for Plaintiff, United States of America.

[Endorsed]: Filed December 16, 1954. [174]

[Title of District Court and Cause.]

NOTICE OF MOTION TO APPLY PROPERTY OF JUDGMENT DEBTORS TOWARD SATISFACTION OF JUDGMENT

To the Appearing Parties in the Above-Entitled Action:

You and each of you will please take notice that on Monday, January 10, 1955, at the hour of 10 o'clock a.m. or as soon thereafter as counsel can be heard in Court Room No. 2, Federal Building, Los Angeles, California, Defendant International Airports, Inc., will move the Court for its Order directing that certain Curtiss C-46A aircraft, Registration No. N-111H, Serial No. 42-6345, the aircraft in suit herein, which this Court heretofore has ordered delivered into the possession of Defendants Charles C. and George C. Finn, be delivered instead into the possession of International Airports, Inc., and applied toward the satisfaction of the judgment of said defendant against [176] Defendants Finn in the Superior Court of the State of California in and for the County of Los Angeles.

Said motion will be made on the ground that a writ of possession against said property has issued out of said Superior Court, and is unsatisfied, in that the aircraft in suit is now in the custody of this United States District Court, by its Marshal or his keeper, awaiting disposition pursuant to judgment heretofore ordered.

Said motion will be based upon this notice, the affidavit of A. J. Blackman served herewith, a certified copy of said writ of possession issued by said Superior Court, the statement of reasons and memorandum of points and authorities filed herewith, together with all of the evidence taken at the trial of the instant cause and papers filed herein.

Dated: January 4, 1955.

/s/ A. J. BLACKMAN
Attorney for defendant,
International Airports, Inc.

Statement of Reasons and Points and Authorities

For brevity, Defendant International Airports, Inc., incorporates by reference its Statement of Reasons and Points and Authorities in support of its Motion to Amend Memorandum of Decision as to Place of Delivery of Airplane.

Additional thereto, said defendant offers excerpts from California Code of Civil Procedure as [177] follows:

Sec. 715: "After the issuing of an execution against property, and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court, that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an

order, require the judgment debtor to appear, at a specified time and place, before such judge or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution * * *"

Sec. 716: "After the issuing of an execution against property, and before its return, any person indebted to the judgment debtor may pay to the sheriff, constable, or marshal having such execution the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and such officer's receipt is a sufficient discharge for the amount so paid."

Sec. 719: "The judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment; but no such order can be made as to money or property in the hands of any other person or claimed to be due from him to the judgment debtor, if such person claims an interest in the property adverse to the judgment debtor or denies the debt."

This record shows that as between Defendants Finn and Defendant, International Airports, Inc., the latter has the superior right to possession of the aircraft in suit. Although defendants Finn have appealed to the California District Court [178]

of Appeal from the Superior Court judgment against them, they have posted no bond staying proceedings.

In the interest of comity, we submit that this Court should honor the writ of possession of said Superior Court by directing its Marshal or any custodian keeping said aircraft for said Marshal, to deliver said aircraft to International Airports, Inc., alone.

/s/ A. J. BLACKMAN,
Attorney for Defendant,
International Airports, Inc.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 4, 1955. [179]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for trial on Wednesday, October 27, 1954, before the Honorable William C. Mathes, Judge presiding, sitting with an advisory jury, in Courtroom No. 2 of the above-entitled court.

Appearances were as follows: Laughlin E. Waters, United States Attorney; Max F. Deutz, Louis Lee Abbott, and Leila F. Bulgrin, Assistants

United States Attorney, by Louis Lee Abbott, Esq., appeared as attorneys for plaintiff; Defendants George C. Finn and Charles C. Finn appeared in propria persona: A. J. Blackman, Esq., appeared as attorney for Defendant, International Airports, Inc.; Roy Gargano, County Counsel of Kern County, and Kit L. Nelson, Assistant County Counsel of Kern County, by Kit L. Nelson, Esq., appeared as attorneys for Vineland Elementary School District of Kern County and Peter A. Bancroft; and Wallace and [182] Cashin, Esqs., appeared for Defendant Seaboard Surety Company.

Defendant Seaboard Surety Company filed a disclaimer of any interest herein and, by stipulation, was dismissed without costs. Certain stipulations of fact having been entered into by all parties, and oral and documentary evidence having been introduced on behalf of all remaining parties, and arguments having been made both orally and in writing, the Court, having considered the same, now makes the following:

Finding of Fact

1. On or about July 25, 1946, plaintiff, by its agency, the War Assets Administration, sold and transferred possession of a certain Curtiss Commando C-46A aircraft, bearing United States Army Serial No. 42-3645 (hereinafter sometimes referred to as "said aircraft") to the Defendant Vineland Elementary School District of Kern County, California (hereinafter sometimes referred to as "Defendant

Vineland"). Such sale and transfer was made pursuant to the Surplus Property Act of 1944, (58 Stat. 766, 50 U.S.C. App., Sec. 1611 et seq.) and regulation 4 thereunder (11 F.R. 5868, Tit. 32 C.F.R. 1946 Supp. Sec. 8304, 1 et seq.) by such sale, plaintiff intended to and did transfer full title to said aircraft to Defendant Vineland. The then fair market value of said aircraft was the sum of $5,000.

2. Defendant Vineland used said aircraft for educational purposes as a classroom at one of its elementary schools for over four years thereafter.

3. In January of 1951, Defendant Vineland regularly published an invitation for bids upon said aircraft, and on February 28, 1951, did sell and did transfer construction possession of said aircraft to Defendant Charles C. Finn and Defendant George C. Finn (hereinafter sometimes referred to as "Defendants Finn"), who were the only bidders therefor, under a written agreement bearing said date (Vineland's Exhibit B). The fair market value [183] of the aircraft on said date was in the sum of $20,000.

4. On April 14, 1951, Defendant Bancroft delivered to Defendants Finn a Civil Aeronautics Administration form bill of sale (Form ACA-500) to said aircraft (Defendants Finn's Exhibit K-4 in evidence). The fair market value of the aircraft on said last mentioned date was in the sum of $25,000.

5. That the board of Trustees of the Vineland School District intended to and did approve the acts of Peter Bancroft in connection with transactions concerning the aircraft in suit; and that said Board of Trustees intended and did regularly act as a Board of Trustees in authorizing the execution of an agreement between defendants Finn and Vineland Elementary School District dated February 28, 1951 (Vineland's Exhibit B).

6. The intention of Defendants Finn in so Purchasing said aircraft was to use it for commercial flight purposes and establish themselves as proprietors in a new independent enterprise in the field of air transportation.

7. On April 16, 1951, the Civil Aeronautics Administration issued to Defendants Finn a certificate of registration for said aircraft, and assigned to it No. N 111H. Officials of the Federal Security Agency authorized to do so did not waive or release the claim of plaintiff under War Assets Administration Form 65 agreement executed by defendant Vineland on or before June 26, 1946 (Plaintiff's Exhibit 1).

8. Said aircraft required substantial repairs before it could be considered airworthy. On August 31, 1951, Defendants Finn as mortgagor executed a chattel mortgage on said aircraft to Defendant, International Airports, Inc., a California corporation (hereinafter sometimes referred to as "Defendant

International"), as security for a loan of $15,000. As part of the same transaction, said parties executed a written lease and a written agreement for the repair and improvement of said aircraft. Said chattel mortgage [184] was recorded by the Civil Aeronautics Administration on November 14, 1951.

9. Thereafter, Defendants Finn transferred possession of said aircraft by flight to Defendant International at its premises at Lockheed Air Terminal, Burbank, California, on or about October 26, 1951. Said aircraft remained in Defendant International's possession until May 25, 1952, during which time Defendant International bestowed labor and materials for its repair and improvement, of the reasonable value of $10,200 for which said Defendant International claimed an aircraft lien under the provisions of California Code of Civil Procedure Section 1208.61 et seq. Defendant International contends that it has at no time released said claimed lien or consented to possession in the Defendants Finn after May 25, 1952.

10. Said loan was made and said labor and materials were bestowed by Defendant International in the ordinary course of its business believing in good faith that Defendants Finn were the true and lawful owners of the aircraft.

11. Although transfer of constructive possession occurred on February 28, 1951, as aforesaid, Defendant Vineland actually released said air-

craft on October 23, 1951, to Defendants Finn for the purpose of having work done on said aircraft which could not otherwise be completed at the Vineland School. In so doing, Defendant Vineland acted in good faith.

12. At no time did Defendants Finn or Defendant Peter A. Bancroft, intentionally or otherwise, induce Defendant Vineland to breach any agreement between said Defendant Vineland and plaintiff; nor did Defendant Vineland ever breach any such agreement.

13. On May 28, 1952, Defendant International commenced action No. 599895 against Defendants Finn in the Superior Court of the State of California in and for the County of Los Angeles for claim and delivery of said aircraft; on June 9, 1952, [185] Defendant International commenced action No. 600291 against Defendants Finn in said Superior Court for foreclosure of its said chattel mortgage. Pursuant to legal process obtained in said action under Part 2, Title 7, Chapter 2 of the California Code of Civil Procedure, the Sheriff of Los Angeles County took possession of said aircraft. Defendants Finn failed to give a written undertaking to retain said aircraft, as provided in Section 514, California Code of Civil Procedure. On June 13, 1952, said Sheriff delivered to International his order under Section 514, California Code of Civil Procedure, releasing said aircraft to International at Lockheed Air Terminal in Bur-

bank. Immediately thereafter the Finns took possession of said aircraft and excluded International therefrom. Said actions were there consolidated for trial, and a judgment thereon entered in favor of Defendant International providing that International have and recover possession of said aircraft, and other relief (International's Exhibit D). An appeal from this judgment is now pending. There has been no stay of execution of the said judgment.

14. Plaintiff does not have the right to possession of said aircraft, and did not have such right either on July 3, 1952 when the instant suit was commenced or at any time thereafter.

15. As between plaintiff and all defendants, the defendants Finn had the right to possession of the aircraft in suit on July 3, 1952, and at all times thereafter; provided that no adjudication of the right to possession as between defendant International and defendants Finn is here made or intended.

16. The United States Marshal for the Southern District of California, acting pursuant to claim and delivery process issued on behalf of plaintiff, took possession of the aircraft in suit at Bakersfield, California, on September 18, 1952, and retained said possession until October 13, 1952, when he delivered said aircraft to plaintiff. Plaintiff retained possession thereof until [186] January 18, 1953, at which time Defendants Finn, without permission of the Government, took pos-

session of said aircraft and retained possession thereof until February 1, 1953, when plaintiff again took possession of said aircraft at Scotty's airstrip in the State of Nevada.

17. The fair market value of said aircraft on July 3, 1952, and on September 18, 1952, was in the sum of $50,000; the fair market value of the use of said aircraft in the condition in which it was in on September 18, 1952, and at all times thereafter was and now is in the sum of $15 per day.

18. As between plaintiff and each defendant, and subject to the provisions of paragraphs 19 and 20 below, these findings of fact shall be a final and complete adjudication of all existing rights or claims in or to the aircraft in suit and all existing claims arising out of the detention of said aircraft by any party hereto.

19. Each and all of the foregoing findings of fact are without prejudice to any claims of defendant International as against Defendants Finn, which may now exist or be hereafter adjudicated in the Superior Court of the State of California in and for the County of Los Angeles, which claims are not here adjudicated.

20. Each and all of the foregoing findings of fact are without prejudice to any other claims, list expressly adjudicated herein, of Defendant Vineland or Defendant Peter A. Bancroft as against Defendants Finn, which may now exist or be hereafter adjudicated.

21. The unanimous findings of the advisory jury are adopted as findings herein. To the extent not inconsistent herewith, the Court's Memorandum of Decision filed December 8, 1954, is hereby incorporated herein by reference. [187]

Conclusions of Law

From the foregoing facts, the Court makes the following conclusions of law:

I.

A declaratory judgment should issue, adjudging as follows:

(1) In July of 1946 the War Assets administration transferred to Vineland Elementary School District full ownership, both legal and equitable, in and to the airplane in suit, more particularly described as that certain Curtiss C-46A aircraft United States Army serial number 42-3645, Civil Aeronautics Administration registration number N-111H.

(2) On February 28, 1951, Defendant Vineland Elementary School District sold, transferred and delivered to Defendants George C. Finn and Charles C. Finn all of its right, title and interest in and to said aircraft in suit.

(3) Plaintiff has neither right to possession, nor valid claim of title to the aircraft in suit.

(4) The provisions concerning certain use and sale of aeronautical property contained in the form

65 agreement (Plaintiff's Exhibit 1) are contradictory to those contained in Regulation 4, Sec. 8304.11 (b), 32 C.F.R. 1946 Supp.), and invalid.

(5) The provisions concerning certain use of aeronautical property contained in Regulation 4 (subsection (2) of Sec. 8304.11 (b), 32 C.F.R. 1946 Supp.) and in the Form 65 agreement (Plaintiff's Exhibit 1) is contrary to the provisions and objectives of the Surplus Property Act of 1944 (58 Stat. 766, 50 U.S.C. App. Sec 1611), and invalid.

II.

Defendants are entitled to judgment that plaintiff take nothing by its amended complaint, and that said complaint be dismissed upon the merits. [188]

III.

Defendants Finn are entitled to judgment on their counter claim against plaintiff that they, their agents, successors, or assigns, recover from plaintiff at Scotty's Airstrip in the State of Nevada the possession of that certain property described as follows: One Curtiss C-46A aircraft, United States Army Serial No. 42-3645, Civil Aeronautics Administration Registration No. N-111H, in the same order and condition as the same was when last seized by the plaintiff on February 1, 1953, ordinary wear and tear excepted; or, in the alternative, should plaintiff so elect, that said Defendants Finn recover from plaintiff the sum of $50,000; that in either event, said Defendants Finn recover from plaintiff as

and for loss of use of said aircraft the sum of $12,300 plus the sum of $15 per day for each and every day such delivery of possession or alternative payment herein provided is delayed after December 31, 1954.

IV.

That as between Defendants Finn and Defendant International only, such judgment should be without prejudice to any claims of Defendant International which may now exist or be hereafter adjudicated in the Superior Court of the State of California in and for the County of Los Angeles.

V.

Except as otherwise provided herein, that as between Defendants Finn and Defendants Vineland School District and Peter A. Bancroft, such judgment should be without prejudice to any other claims of defendants Vineland and Peter A. Bancroft against Defendants Finn which may now exist or be hereafter adjudicated.

VI.

Let judgment be entered accordingly.

Dated: February 7, 1955.

/s/ WM. C. MATHES,
United States District Judge.

Receipt of copy acknowledged.

Lodged February 2, 1955.

[Endorsed]: Filed February 7, 1955. [189]

United States District Court for the Southern District of California, Central Division

No. 14309-WM-Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC.; PETER A. BANCROFT, VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY and SEABOARD SURETY COMPANY, a Corporation,

Defendants.

JUDGMENT

(For Defendants, and for Defendants Finn on Counter Claim)

This cause having come on for trial on October 27, 1954, and the Court having taken such evidence as was offered by all parties as to the issues in the case,

It Is Ordered, Adjudged and Decreed that:

(1) In July of 1946 the War Assets Administration transferred to Vineland Elementary School District full ownership, both legal and equitable, in and to the airplane in suit, more particularly described as that certain Curtiss C-46A aircraft, United States Army Serial No. 42-3645, Civil Aeronautics Administration Registration No. N-111H.

(2) On February 28, 1951, Defendant Vineland Elementary School District, sold, transferred, and delivered to Defendants George C. Finn and Charles C. Finn all of its right, title and interest in and to said aircraft in suit. [191]

(3) Plaintiff has neither right to possession, nor valid claim of title to the aircraft in suit.

(4) The provisions concerning certain use and sale of aeronautical property contained in the Form 65 agreement (Plaintiff's Exhibit 1) are contradictory to those contained in Regulation 4, Sec. 8304.11(b), 32 C.F.R. 1946 Supp., and invalid.

(5) The provisions concerning certain use of aeronautical property contained in Regulation 4 (subsection (2) of Sec. 8304.11(b), 32 C.F.R. 1946 Supp.) and in the Form 65 agreement (Plaintiff's Exhibit 1) are contrary to the provisions and objectives of the Surplus Property Act of 1944 (58 Stat. 766, 50 U.S.C. App. Sec. 1611), and invalid.

It Is Further Ordered, Adjudged and Decreed that plaintiff take nothing by its amended complaint herein, and that said complaint is dismissed upon the merits.

It Is Further Ordered, Adjudged and Decreed that Defendants George C. Finn and Charles C. Finn, their agents, successors, or assigns, recover from plaintiff at Scotty's Airstrip in the State of Nevada the possession of that certain property described as follows: One Curtiss C-46A aircraft, United States Army Serial No. 42-3645, Civil Aero-

nautics Administration Registration No. N-111H, in the same order and condition as the same was when last seized by plaintiff on February 1, 1953, ordinary wear and tear excepted; or, in the alternative, should plaintiff so elect, that said defendants Finn recover from plaintiff the sum of $50,000; that in either event, said defendants Finn recover from plaintiff as and for loss of use of said aircraft the sum of $12,300 plus the sum of $15 per day for each and every day such delivery of possession or alternative payment herein provided is delayed after December 31, 1954.

It Is Further Ordered, Adjudged and Decreed that as between Defendants George C. Finn and Charles C. Finn and Defendant [192] International Airports, Inc., only, this judgment is without prejudice to any claims of Defendant International Airports, Inc., which now may exist or be hereafter adjudicated in the Superior Court of the State of California in and for the County of Los Angeles.

It Is Further Ordered, Adjudged and Decreed that except as otherwise provided herein, that as between Defendants George C. Finn and Charles C. Finn and Defendant Vineland School District and Defendant Peter A. Bancroft only, this judgment is without prejudice to any other claims of Defendants Vineland and Bancroft which may now exist or may be hereafter adjudicated.

It Is Further Ordered, Adjudged and Decreed that as between plaintiff and each defendant, and

subject to the provisions of the two paragraphs of this judgment last preceding, this judgment shall be a final and complete adjudication of all existing rights or claims in or to the aircraft in suit and all existing claims arising out of the detention of said aircraft by any party hereto.

Dated: February 7, 1955.

/s/ WM. C. MATHES,
United States District Judge.

Receipt of copy acknowledged.

Lodged February 2, 1955.

[Endorsed]: Filed February 7, 1955.

Judgment docketed and entered February 8, 1955. [193]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL; AND MOTION TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Plaintiff, United States of America, pursuant to Rules 52 and 59, Federal Rules of Civil Procedure, without abandoning or waiving any other objections to the Findings of Fact, Conclusions of Law, and Judgment, asserted by it, moves the Court as follows:

I.

A. For an order amending the Findings of Fact

filed February 7, 1955, by striking from the finding of fact numbered 15 the words "defendants Finn" at page 5, line 23, and inserting in place thereof the words "defendant International Airports, Inc."

B. For an order amending conclusion of law III by:

1. Striking therefrom the words:
"that in either event, said Defendants Finn recover from plaintiff as and for loss of use of said aircraft the sum of $12,300 plus the sum of $15 per day for each and every day such delivery of possession or alternative payment herein provided is delayed after December 31, 1954."

at page 8, lines 12 through 16; or, in the alternative:

2. Striking therefrom the words and figures:
"12,300 plus the sum of $15 per day for each and every day such delivery of [197] possession or alternative payment herein provided is delayed after December 31, 1954."

at page 8, lines 13 through 16, and inserting in place thereof the figure "$12,870."

C. For an order amending the Judgment entered February 8, 1955, by:

1. Striking therefrom the words:
"that in either event, said defendants Finn recover from plaintiff as and for loss of use of said aircraft the sum of $12,300 plus the sum of $15 per day for each and every day

such delivery of possession or alternative payment herein provided is delayed after December 31, 1954."

at page 2, lines 25 through 30; or, in the alternative:

2. Striking therefrom the words and figures: "12,300 plus the sum of $15 per day for each and every day such delivery of possession or alternative payment herein provided is delayed after December 31, 1954."

at page 2, lines 27 through 30, and inserting in place thereof the figure $12,870."

Should the Court fail to grant all of the relief sought in paragraphs A, B-1, and C-1 above, then plaintiff further moves for an order opening the Judgment and granting a new trial with respect to the following issues:

(A) Which of the parties hereto has and will have the right to possession of the aircraft in suit from September 18, 1952, to the date upon which the accrual of damages recovered by the defendants [198] Finn for loss of use of said aircraft, pursuant to conclusion of law III, and Judgment, page 2, lines 25 through 30, shall terminate.

(B) Which of the parties hereto, if any, has or will have the right to make beneficial use of the aircraft in suit from September 18, 1952, to the date upon which the accrual of damages recovered by the defendants Finn for loss of use of said aircraft,

pursuant to conclusion of law III, and Judgment, page 2, lines 25 through 30, shall terminate.

Said Motions are based upon the Writ of Possession issued by the Superior Court of the State of California, in and for the County of Los Angeles, in International Airports, Inc., v. Charles C. Finn, et al., Nos. 599,895 and 600,291 (consolidated cases), dated January 3, 1955, and made a part of the record herein as an exhibit to Notice of Motion to Apply Property of Judgment Debtors Toward Satisfaction of Judgment, filed by defendant International Airports, Inc., on January 4, 1955; Order of this Court made February 7, 1955, granting defendant International's Motion to Apply Property of Judgment Debtors Toward Satisfaction of Judgment; certified copy of docket in International Airports, Inc., v. George C. Finn, et al., Civil No. 20076, California District Court of Appeal, Second District, Division 1, attached hereto as Exhibit A; the Points and Authorities filed herewith; and upon all of the records, pleadings, evidence, briefs, papers and proceedings in this cause; and upon the following grounds:

(a) As between defendant International Airports, Inc., and defendants George C. Finn and Charles C. Finn, defendant International Airports, Inc., has had the right to possession of the aircraft in suit at all times from September 18, 1952, to the date upon which the accrual of damages recovered by the defendants Finn for loss of use of said aircraft will terminate, by virtue of: [199]

(i) An aircraft lien, possessory in nature, created pursuant to California Code of Civil Procedure, Section 1208.61, et seq., for work and materials bestowed in the improvement of said aircraft prior to May 25, 1952 (finding of fact numbered 9);

(ii) A Chattel Mortgage between defendants George C. Finn and Charles C. Finn, as mortgagor, and defendant International Airports, Inc., as mortgagee, dated August 31, 1951 (finding of fact numbered 8; Exhibit B), which provides, in part, that upon default the mortgagee may at its option enter upon the premises where the said aircraft may be and take possession thereof;

(iii) Claim and delivery process obtained with respect to International Airports, Inc., v. Charles C. Finn, et al., No. 599,895, in the Superior Court of the State of California in and for the County of Los Angeles, which process was executed by the Sheriff of Los Angeles County, California, pursuant to Part II, Title 7, Chapter 2, of the California Code of Civil Procedure, said Sheriff making delivery of said aircraft to defendant International Airports, Inc., on June 13, 1952, pursuant to California Code of Civil Procedure, Section 514 (finding of fact numbered 13; defendant International's Exhibit O);

(iv) Judgment in International Airports, Inc., v. Charles C. Finn, et al., Nos. 599,895 and

600,291, in the Superior Court of the State of California in and for the County of Los Angeles, entered March 3, 1953, which provides, in part, [200] that International Airports, Inc., have and recover from defendants Charles C. Finn and George C. Finn the possession of the aircraft in suit. Execution of the said Judgment has not been stayed. (Finding of fact numbered 13; defendant International's Exhibit D.) An appeal from said Judgment is now pending. Oral argument has been waived and the cause will stand submitted on February 21, 1955 (Exhibit A, attached hereto);

(v) Writ of Possession issued by the Superior Court of the State of California, in and for the County of Los Angeles, in International Airports, Inc., v. Charles C. Finn, et al., Nos. 599,895 and 600,291 (consolidated cases), dated January 3, 1955, and made a part of the record herein as an exhibit to Notice of Motion to Apply Property of Judgment Debtors Toward Satisfaction of Judgment, filed by defendant International Airports, Inc., on January 4, 1955;

(vi) Order of this Court made February 7, 1955, granting defendant International's Motion to Apply Property of Judgment Debtors Toward Satisfaction of Judgment.

(b) That the proceedings, process and Judgment of the Superior Court of the State of California, in and for the County of Los Angeles, more particu-

larly described in subparagraph (a) above, although subject in part to appeal in the courts of said State, are not subject to collateral attack in this cause.

(c) That this Court has in fact given effect to said process, proceedings and Judgment in making its Order [201] of February 7, 1955, granting defendant International's Motion to Apply Property of Judgment Debtors Toward Satisfaction of Judgment, which Order is inconsistent with the finding that the defendants Finn are entitled to the possession of the aircraft in suit, and with the award of damages for the loss of use thereof. This Court also gave effect to the Superior Court Judgment in requiring that the Government stipulate to the reasonable value of work and materials bestowed upon the aircraft in suit by defendant International Airports, Inc., as that value had been fixed in said Judgment, or face an indefinite postponement of the trial of the cause. (Tr. Proceedings of Tuesday, October 12, 1954, page 13, line 6, through page 18, line 21.)

(d) In any event, the decision of the District Court of Appeal, with reference to the appeal from the Judgment of the above-described Superior Court action, should, in the ordinary course of events, be rendered in the near future (see Exhibit A attached hereto). However, plaintiff respectfully urges that this Honorable Court can and should grant the relief sought at paragraphs A, B-1 and C-1 above without awaiting said decision.

(e) The evidence is insufficient to justify and the weight of the evidence is against finding of fact numbered 15 and the decision of the Court with respect to the award of damages to the defendants Finn for loss of use of the aircraft in suit for the reasons stated in subparagraphs (a), (b), (c) and (d) above.

(f) Damages for wrongful detention cannot be awarded for a period after the date of Judgment.

(g) The decision and Judgment awarding damages to the defendants Finn for loss of use of the aircraft in suit [202] are against law for the reasons stated in subparagraphs (a), (b), (c), (d), (e) and (f) above.

(h) There is newly discovered evidence, material to plaintiff's case, to wit:

(i) The Writ of Possession issued by the Superior Court of the State of California, in and for the County of Los Angeles, in International Airports, Inc., v. Charles C. Finn, et al., Nos. 599,895 and 600,291 (consolidated cases), dated January 3, 1955, and made a part of the record herein as an exhibit to Notice of Motion to Apply Property of Judgment Debtors Toward Satisfaction of Judgment, filed by defendant International Airports, Inc., on January 4, 1955;

(ii) Order of this Court made February 7, 1955, granting defendant International's Mo-

tion to Apply Property of Judgment Debtors Toward Satisfaction of Judgment;

which newly discovered evidence plaintiff could not with reasonable diligence have discovered and produced at the time of trial since said Writ had not been issued and said Order had not been made at the time of trial.

II.

A. For an order amending the Findings of Fact filed February 7, 1955, by:

1. Striking from finding of fact numbered 17 the words "on July 3, 1952, and" at page 6, lines 6 and 7;

2. Striking from finding of fact numbered 17 the figure "$50,000" at page 6, line 7, and by [203] inserting in place of said figure "$30,000."

B. For an order amending Conclusion of Law III by striking therefrom the figure "$50,000" at page 8, line 11, and inserting in place thereof the figure "$30,000."

C. For an order amending the Judgment entered February 8, 1955, by striking therefrom the figure "$50,000" at page 2, line 25, and inserting in place thereof the figure "$30,000."

Should the Court fail to grant all of the relief sought in paragraphs A, B and C above, then plaintiff further moves for an order opening the Judgment, entered February 8, 1955, setting aside the verdict rendered by the advisory jury in answer to

Interrogatory 20, and granting a new trial with respect to the following issues:

(A) What was the fair market value in cash of the aircraft in suit on July 3, 1952.

(B) What was the fair market value in cash of the aircraft in suit on September 18, 1952.

Said Motions are based upon the records, pleadings, briefs, exhibits and papers on file herein, the Minutes of the Court, the official court reporter's transcript of the testimony, and the notes and memoranda kept by the trial Judge; and are made upon the following grounds:

(a) The evidence is insufficient to justify and the weight of the evidence is against the verdict rendered by the advisory jury in answer to Interrogatory 20 in that the only competent evidence presented to the jury relative to the fair market value for cash of the aircraft in suit on July 3, 1952, is the testimony of Douglas Duly, who stated that said fair market value was $30,000 (Tr. October 27, 1954, page 114, lines 10 through 15); [204]

(b) The evidence is insufficient to justify and the weight of the evidence is against the finding of fair market value of the aircraft in suit on September 18, 1952, which finding is contained in finding of fact numbered 17 in that the only witnesses who testified relative to said issue fixed said fair market value as follows:

Name of Witness: Douglas Duly.

Value: $30,000.

(Reference to the Transcript: Tr. November 5, 1954, page 61, lines 8-21.)

Name of Witness: George E. Batchelor.

Value: $33,000.

(Reference to the Transcript: Tr. November 5, 1954, page 43, line 8, through page 45, line 4.)

A motion picture made in 1949 and an equivocal and repudiated offer made in August of 1951 are not evidence sufficient to support a finding outside the range of fair market value fixed by said testimony. The advisory jury could hardly have considered either the picture or the equivocal offer in making a finding as to fair market value since it placed the fair market value for the period February 28, 1951, through October 26, 1951, at from $20,000 to $25,000 (Interrogatories 17, 18 and 19). The allegations in a pleading filed by a party which has not had possession of the personal property being valued during the six-year period preceding the filing of that pleading is not evidence which should permit a finding of fair market value outside of the range of values fixed by the sworn and uncontradicted testimony of qualified experts called by both parties.

(c) The fair market value of the aircraft in suit as found by the advisory jury in response to Interrogatory 20, Special Verdict, appears to have been given under the [205] influence of passion or prejudice.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant United States Attorney, Chief of Civil Division;

/s/ LOUIS LEE ABBOTT,
Assistant United States Attorney, Attorneys for Plaintiff. [206]

EXHIBIT A

Second District, Civil No. 20076

Los Angeles County
599895-600291

INTERNATIONAL AIRPORTS, INC.,

Pltf. & Respt.,

vs.

CHARLES C. FINN, et al.,

Defts. & Applts.

Charles J. Griffin, Judge.

A. J. Blackman,
315 W. 9th St.,
Los Angeles 15, Calif.,
For International Airports, Inc.

Charles C. Finn,
7617 Lexington Ave.,
Hollywood 25, Calif.,
In Propria Persona.

Dec. 3, 1953—Filed notice of motion to dismiss appeals 12/22.

Dec. 22, 1953—Aplts. relieved from default, 48 hours to pay fee for clerk's trans., 10 days to file record on appeal.

Dec. 23, 1953—Rec'd receipt for fees of County Clerk. Assigned to Division One.

Dec. 28, 1953—Filed cert. of county clerk (re rep. Trans.) & receipt of reporter for fees.

Jan. 5, 1954—Filed record on Appeal C 1, 2 appeals from jdmt. R 3

Jan. 25, 1954—Rec'd filing fee for second appeal.

May 24, 1954—Aplt. notified pursuant to Rule 17a.

Sept. 28, 1954—Filed appellants opening brief.

Dec. 15, 1954—Filed respondents brief.

Dec. 29, 1954—Ordered on calendar Jan. 25, 1955.

Jan. 13, 1955—Exhibits received from Superior Court.

Jan. 25, 1955—Argument waived, aplts. 10 days to file brief, then aplts. 2/21/55 submit.

I, J. E. Brown, Clerk of the District Court of Appeals in and for the Second Appellate District of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of page 20076 of Civil Register of Actions as shown by the records of my office.

Witness my hand and the Seal of the Court, this 15th day of February, A.D. 1955.

[Seal] J. E. BROWN,
Clerk.

By /s/ J. T. ALLEY,
Deputy Clerk.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 18, 1955. [212]

United States District Court for the Southern District of California, Central Division

No. 14309 WM Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC., PETER A. BANCROFT, VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, and SEABOARD SURETY COMPANY, a Corporation,

Defendants.

ORDER GRANTING MOTION OF DEFENDANT INTERNATIONAL AIRPORTS, INC., TO APPLY PROPERTY OF JUDGMENT DEBTORS TOWARD SATISFACTION OF JUDGMENT

The motion of the Defendant, International Airports, Inc., to apply property of judgment debtors

toward satisfaction of judgment having come on for hearing on February 7, 1955, at 2:00 o'clock in the afternoon, before the Honorable William C. Mathes; the Defendant, International Airports, Inc., appearing by its counsel, A. J. Blackman; the Defendants, Vineland Elementary School District of Kern County and Peter A. Bancroft appearing by their counsel, Kit L. Nelson; the Defendants George C. Finn and Charles C. Finn appearing in propria persona; and Laughlin E. Waters, United States Attorney, by Louis Lee Abbott, Assistant United States Attorney, appearing on behalf of plaintiff; and the Court being fully advised in the premises; [215]

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the motion of the Defendant, International Airports, Inc., to apply property of Judgment debtors toward satisfaction of judgment be and the same is hereby granted, as follows: That if plaintiff should elect to deliver to Defendants George C. Finn and Charles C. Finn, their agents, successors or assigns, the possession of that certain Curtiss C-46A aircraft, United States Army Serial No. 42-3645, Civil Aeronautics Administration Registration No. N-111H, as provided in the judgment docketed herein, said aircraft shall be delivered instead to Defendant, International Airports, Inc., and in the same order and condition specified in said judgment, and at the same place as is specified therein, or at such other place as

may be agreed upon in writing between plaintiff and said defendant;

It Is Further Ordered, Adjudged and Decreed that upon such delivery, Defendant, International Airports, Inc., with reasonable dispatch shall cause said aircraft to be flown or otherwise transported to Los Angeles County and there delivered into the custody of the Sheriff of said county for disposition pursuant to the writ of possession issued, or any alias writ of possession which may hereafter be issued, by the Superior Court of the State of California in and for the County of Los Angeles, in the consolidated cases entitled "International Airports, Inc., plaintiff, vs. Charles C. Finn and George C. Finn, defendants," No. 599,895 and No. 600,291 in the files of said Court;

It Is Further Ordered that subject to further order of this Court, Defendants Charles C. Finn and George C. Finn, their agents, employees, representatives, and any and everyone acting for or on behalf of said Defendants Charles C. Finn and George C. Finn, or either, be and they hereby are enjoined and restrained from moving, flying, or doing anything with or to the aircraft [216] hereinabove specifically described, or from interfering, directly or indirectly, with the possession of said aircraft by plaintiff, or Defendant, International Airports, Inc., or the Sheriff of Los Angeles County or the custodian of any of them, until permitted so to do by further order of Court, State or Federal.

Dated: February 28, 1955.

/s/ WM. C. MATHES,
Judge of United States District Court.

Affidavit of service by mail attached.

Lodged February 18, 1955.

[Endorsed]: Filed February 28, 1955.

Judgment docketed and entered March 1, [217] 1955.

[Title of District Court and Cause.]

ORDER DENYING MOTIONS OF PLAINTIFF FOR NEW TRIAL AND TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Plaintiff's Motion for New Trial and Motion to Amend Findings of Fact, Conclusions of Law, and Judgment, having come on for hearing on March 21, 1955, at 10:00 o'clock a.m., before the Honorable William C. Mathes; Laughlin E. Waters, United States Attorney, by Louis Lee Abbott, Assistant United States Attorney, appearing on behalf of plaintiff; Defendant International Airports, Inc., appearing by its counsel, A. J. Blackman; Defendant Vineland Elementary School District of Kern County and Defendant Peter A. Bancroft appearing by their counsel, Roy Gargano,

County Counsel of Kern County, by Dennis McCarthy; Defendant Charles C. Finn appearing in propria persona, and Defendant George C. Finn being absent; and it appearing that proper notice of the time and place of hearing has been given, and the Court being fully advised in the premises;

Now Therefore, It Is Hereby Ordered, Adjudged and [220] Decreed that the plaintiff's Motion for New Trial be and the same is hereby denied;

It Is Further Ordered, Adjudged and Decreed that plaintiff's Motion to Amend Findings of Fact, Conclusions of Law, and Judgment be and the same is hereby denied.

Done in Open Court March 21, 1955.

/s/ WM. C. MATHES,
Judge of the United States
District Court.

Affidavit of service by mail attached.

[Endorsed]: Filed March 31, 1955. [221]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER DENYING MOTIONS OF PLAINTIFF FOR NEW TRIAL AND TO AMEND FINDINGS OF FACT, CONLUSIONS OF LAW, AND JUDGMENT

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals

to the United States Court of Appeals for the Ninth Circuit from the Order Denying Motions of Plaintiff for New Trial and to Amend Findings of Fact, Conclusions of Law, and Judgment, entered March 31, 1955.

Dated: April 12, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed April 13, 1955. [224]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM FINAL JUDGMENT

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on February 8, 1955.

Dated: April 12, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Affidavit of mail attached.

[Endorsed]: Filed April 13, 1955. [225]

In the United States District Court, Southern District of California, Central Division

No. 14309-HW Civil

Honorable Harry C. Westover, Judge Presiding.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE C. FINN, et al.,

Defendants.

REPORTERS TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:
HARRY D. STEWARD,
Assistant United States Attorney.

For the Defendant, International Airports, Inc.:

NORMAN KULL, Esq.

For the Defendants, Vineland Elementary School District and Peter A. Bancroft:

ROBERT WYCOFF, Esq.

For the Defendants George C. Finn and Charles C. Finn:

In Propria Persona.

November 9, 1953—10:00 a.m.

The Clerk: No. 10, 14309, United States vs. George C. Finn, et al., resetting.

Mr. Steward: The government is ready on that.

Mr. Kull: Ready for International Airports.

Mr. Wycoff: Ready for the Vineland School District.

The Court: What have you decided to do about filing a disqualification?

Mr. Finn: Your Honor, we have reached a decision. We are unanimous. We have first a reasonable request, which we consider reasonable. There is a matter in the record which we don't understand the importance of.

The Court: Now, Mr. Finn, I haven't got time to discuss this question with you. We are here for a question of setting. If you want to disqualify me, tell me you are going to file an affidavit and I will transfer this case out. Otherwise, I am going to set it. I am not going to try to explain any of the things that are in the record. You are here

to set the case or transfer it out. Which do you want us to do?

Mr. Finn: Under the circumstances, your Honor, if we can't have a clarification of the record, we will have to transfer it out.

The Court: All right. I will transfer this case to Judge Yankwich for further proceedings. [2*]

Judge Yankwich is here today, so you take the file over to him and he will dispose of this for you as promptly as he disposes of other matters. [3]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California this 11th day of May 1955.

/s/ S. J. TRAINOR,
Official Reporter. [4]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Thursday, August 26, 1954.

Honorable William C. Mathes, Judge presiding. [5]

* * *

The Court: The United States of America is sovereign. It can only be sued, no matter what it does, it can only be sued by consent of the Congress. Now, just get that into your head. It can only be sued under those circumstances, and in those connections where Congress consents for it to be sued.

Mr. Charles C. Finn: I certainly take the Court's opinion on that, your Honor.

The Court: Now, the point Mr. Cohen made, it is a close legal question. He makes the point that where the Government subjects itself to the jurisdiction of the court and asserts [14] a claim that the person against whom the claim is asserted has a right to assert any pertinent counterclaim. Now, as I say, it is a question of law. That may be a close question in this case, as to how far it is applicable in view of the express provision of the Federal Torts Claims Act, withholding consent to be sued for certain torts such as false imprisonment, slander and the like. But Code Section 2406 of Title 28 of the United States Code makes provision for offsetting claims, not to recover an affirmative amount, but to offset against the Government claims certain amount—quite a different thing.

Here in this cross-complaint—in the first place, there is no such thing as a cross-complaint in Federal law; either a counterclaim or cross-claim. This is a counterclaim which you filed here, seeking

some two million dollars damages. Now the Government's suit against you prays for considerably less money.

Now, assuming that properly pleaded, the court would have jurisdiction of the counterclaim, the court would have no jurisdiction to render affirmative judgment against the United States, but only jurisdiction to offset against the Government's claim any counterclaim that you might be able to establish.

Mr. Charles C. Finn: I see, your Honor.

The Court: Now, If you want to read—I trust Mr. Cohen will want to if he hasn't already—Section 2406 of [15] Title 28 of the United States Code. That is Section 2406 of Title 28, Rule 13(d)—subsection (d) of rule 13 of the Federal Rules of Civil Procedure. And United States vs. Shaw, 309 U.S. 495, page 500 to 503; U.S. vs. The Thelka, opinion by Mr. Justice Holmes, 266 U.S. 329 at pages 339 and 340. And opinion by Mr. Justice Field in The Siren case. Those are admiralty cases and involve a res which is involved here, I take it. This is basically a suit for, at least one claim of the Government is a suit for possession of this plane. So you may want to consider whether the admiralty cases are applicable here, such as The Thelka case I just cited. The Siren case is Wallace 74 U.S. 152 at pages 153 and 154.

Now, assuming that the court would have jurisdiction, as I say, of the counterclaim against the United States, it is not properly pleaded.

And as far as Col. J. L. Ulricson is concerned,

if you are suing him in his official capacity, you are, in effect, suing the United States. If you are suing him as an individual, then it would be necessary to predicate any jurisdiction of this court upon diversity of citizenship. And there is no allegation here as to the citizenship of Col. Ulricson.

Mr. Charles C. Finn: Your Honor, I ask that the pleading be amended to show, and on information and belief, that he [16] is a citizen of the State of Nevada.

The Court: No. Your cross-complaint has already been amended once. If you had denominated that as a counterclaim, is Col. Ulricson a defendant?

Mr. Charles C. Finn: Yes.

The Court: You would have to get permission to bring Col. Ulricson and add him as a cross-defendant to the action, and you would have to supply a pleading that complies with rule 8. This Pleading doesn't.

Mr. Charles C. Finn: May we have that permission, your Honor?

The Court: Yes. The motion to dismiss the so-called cross-complaint of Charles C. Finn is granted.

How much time do you wish in which to serve and file a counterclaim, if so advised?

Mr. Charles C. Finn: Your Honor, we have got considerable problems. We have an appeal before the——

The Court: Well, this case is going ahead. I can give you 20 days under the rules. If you need 20

days you may have 20 days in which to serve and file a counterclaim. [17]

* * *

October 12, 1954.

* * *

The Court: May it be stipulated then, Gentlemen, that for the purpose, of this pending action only, and not for any other purpose, and subject to the understanding that such admission is for the purpose of this action only and for no other purpose and may not be used against any other party in [11] any other proceeding, or in favor of any party in any other proceeding, that during the period from September, 1951, to May of 1952, the defendant, International Airports, Inc., a corporation, at the request of the defendants George C. and Charles C. Finn furnished labor and materials which were used and consumed in the improvement of the airplane in the suit of the reasonable market value of $10,200; and furnished storage service of the reasonable value of $550; and that such labor and materials and supplies and services were so furnished in good faith by International Airports, Inc., without knowledge of any claim of the plaintiff to ownership of the airplane, and in the good-faith belief on the part of International Airports Inc., that the defendants George C. and Charles C. Finn were during that period, the owners of the airplane?

Mr. Abbott: The Government, your Honor, can stipulate that work was done——

The Court: Now, wait a minute. Don't be repeating my stipulation. Will you accept it or not? If you say no, that stops that.

Mr. Abbott: We cannot accept it, your Honor. It goes to the very heart of our case against International.

The Court: You can't accept the figures?

Mr. Abbott: We cannot.

The Court: What goes to the heart of your defense? The [12] question of whether or not it was done in good faith?

Mr. Abbott: And without knowledge or notice.

The Court: Can you accept it without that?

Mr. Abbott: Without putting them to the necessity of trying the matter?

The Court: Can you accept the stipulation if you eliminate the part that states that it was done in good faith and without notice of the plaintiff's claim?

Mr. Abbott: We cannot, your Honor.

The Court: What part of it can you not accept?

Mr. Abbott: We cannot accept the values because they were litigated in the state court, and the Finns and International are the only people who know the extent of the work done took the position that the work was not of that value. The Government desires——

The Court: The court litigated it over there. Do you want to hear it again here?

Mr. Abbott: Only in general terms, your Honor.

The Court: I will put the case on the calendar

for 1970, if you are going to take that attitude.

Mr. Abbott: It is the Government's view, your Honor, that a witness for International could describe what was done.

The Court: I am not going to hear it. The Superior Court has litigated that between these parties. It was [13] presumably not a collusive lawsuit.

Mr. Abbott: The view of the Government testimony devoted to that issue would not exceed, to the most, a couple of hours. It is rather anticipated we will acquiesce in the statement of the witness once we heard it.

The Court: Unless the Government can say that the Government feels that the action in the state court was collusive, then the Government ought to accept the——

Mr. Abbott: The defendants Finn were not represented by counsel in that action.

The Court: I don't care. They were before a court and unless you think it was a collusive action you should be willing to accept the state court's action if these people are willing to accept it.

Before we get into that, suppose we see if the defendants Finn are agreeable.

Mr. Charles C. Finn: Well, your Honor——

The Court: Just say yes or no. That saves a lot of time.

Mr. Charles C. Finn: Your Honor,——

Mr. George C. Finn: Yes, your Honor.

The Court: Very well. I don't know whether

International Airports will accept it or not. I was merely stating a stipulation that I thought [14] would——

Mr. Blackman: International Airports, Inc., will acept the statement.

The Court: All or any part of it?

Mr. Blackman: Yes, your Honor.

Mr. Wallace: Seaboard Surety Company cannot accept the stipulation.

Mr. Nelson: We cannot accept the stipulation.

The Court: That settles that. If that is typical of what we are going to run into tomorrow, gentlemen, we just might as well forget it. I am not going to waste my time. I will try the case. Anything in the state court that has been adjudicated before between the parties, if you can't even stipulate to that, why, there is very little hope you might be able to stipulate to anything, I suppose. In particular, when the Government starts out not even to stipulate what the state court adjudicated, that is a pretty bad sign.

Mr. Abbott: We were not a party to that action.

The Court: I don't care. I know you were not a party to the action. But it is a state court, a duly constituted court. Unless you think it was collusive action between the parties, why would you want another court to adjudicate that matter of the amount and the value of the work done? Now, on the question of good faith or the question of notice of the plaintiff's claim, that was not in issue, I take it, [15] over there; but as far as what was in issue between the Finns and the Airport—and it

was presumably an adversary proceeding adjudicated in good faith by a court of competent jurisdiction—why you gentlemen can't accept that, I don't know; and particularly the United States Government.

Mr. Wallace: If your Honor please, speaking for Seaboard Surety Company, it was my understanding that in the stipulation there was included some notice or knowledge by International Airports.

The Court: We eliminated that. In my discussion with the Government I didn't understand that the stipulation, as it remained, covered anything more than the furnishing of the materials and labor and service and the supplies, during that period, of a reasonable value of a certain amount, at the request of the Finns, and for which the airport, I take it, has not been paid.

Mr. Blackman: That is correct.

Mr. Wallace: If the court please, at a date on or about March 11, 1952, in the midst of this period which service was being furnished, a bill of sale was given Seaboard Surety in New York for this aircraft, and whether notice reached International Airports or not, we have no information.

The Court: Well, I eliminated the question of good faith. I attempted to limit it to what was adjudicated in the state court. As I understand what was adjudicated, there [16] was the furnishing of the labor, material, supplies and service during that period; and the value of it.

Mr. Abbott: Your Honor, we will employ an expert to review the record in the state court pro-

ceeding and give us an estimate of the value of the materials as shown in that proceeding, and we may be in a position to stipulate on this point. The Government in effect by stipulating at this time would be conceding something that——

The Court: Conceding that the state court in adversary litigation between the parties most vitally interested properly adjudicated the matter, which is apparently more than the parties themselves conceded.

Mr. Abbott: We are cognizant of the fact that the Finns were not represented by counsel.

The Court: What difference does that make?

Mr. Abbott: Well, I could assume that the absence of counsel could make quite a difference on the outcome of a litigation.

The Court: It might unless you deny any was furnished at all. I take it when it comes to furnishing the amount and value the court would make the same determination whether counsel was present or not.

Mr. Abbott: It may be that the only witnesses called on this point were witnesses by International Airports.

The Court: The minutes of the court will show who was [17] called.

Mr. Abbott: We haven't examined it for that purpose.

We will make every effort to verify the amount of the claim, and if we can possibly stipulate to it we will do so.

The Court: Only for the purpose of this action.

The only suggestion was made for the purpose of this action. It seems to me the Government would be in very poor grace to say that the Government wouldn't accept a result reached by a court of competent jurisdiction in adversary litigation between the two parties who were really in interest, unless the Government thought it was a collusive suit.

Mr. Abbott: The Government is in no position to suggest it was a collusive suit, your Honor.

The Court: It seems to me that the Government in good grace should accept that determination and not ask this court to try it over again. I have no intention of trying it over again, gentlemen. If you won't agree on that for the purposes of this case there is no use in talking about agreeing to anything. I don't expect to waste my time trying the case under those circumstances. I will put it at the foot of my calendar. [18]

* * *

October 18, 1954.

* * *

The Court: Is there anything else to take up at this pretrial conference?

Mr. Charles C. Finn: Yes. I have something that I haven't been able to complete here; something which the court has indicated, in some of the cases, that the court had, and we looked them up and it seems to indicate that there would be no validity to our counterclaim unless we first made a claim

against the Government in the Court of Claims, or to the Accounting Office. [274]

The Court: How much money is demanded in the counter-claim?

Mr. Charles C. Finn: The same amount as the Government, $8,000 a month, according to the Government's figures.

The Court: That's a set-off, really, against the Government's claim, isn't it?

Mr. George C. Finn: Yes, your Honor.

The Court: What does the statute say?

Mr. Charles C. Finn: It said no claim could be allowed unless the Government—unless you had first made a claim which was refused, and if it hadn't been refused in the matter of 15 days, the claim could be withdrawn and a suit instituted.

The Court: Haven't you made a claim against the Government?

Mr. Charles C. Finn: Not to the proper authorities, not to the Accounting Office.

The Court: Does the Government make the contention no claim has been made under the statute?

Mr. Abbott: We do, your Honor.

The Court: Perhaps you better get off the claim this afternoon. Does the statute say when the claim must be made?

Mr. Charles C. Finn: No, your Honor. It says before any claim—that a claim must be made before a suit could be [275] brought.

The Court: You make your claim. I suggest you do it immediately.

Mr. Charles C. Finn: We went to the Accounting

Office, and there doesn't seem to be any particular form that we can find for making the claim. So we will just submit our counterclaim in letter form to the Accounting Office, and do whatever we can to get it through proper channels.

The Court: Do you have an extra copy of it?

Mr. Charles C. Finn: Yes.

The Court: Just send them a copy of the counterclaim and explain in your letter that you are asserting that claim pursuant to the section of the statute.

Mr. Charles C. Finn: Will it be necessary for them to answer?

The Court: Either that, or 15 days must elapse.

Mr. George C. Finn: We wouldn't have any counterclaim by the 26th of October if they don't answer.

The Court: You may have one before the time this is all over. I will hear your evidence on it, if necessary.

What is the section of Title 28 that deals with this?

Mr. Abbott: Section 2406, your Honor. [276]

* * *

October 27, 1954; 10:00 A.M.

The Court: Are there ex parte matters? Call the calendar.

(Other court matters.)

The Clerk: 14309, United States vs. George C. Finn, et al.

Mr. Abbott: Ready for the United States, your Honor.

Mr. Blackman: Ready for International.

Mr. Nelson: Ready for Vineland School District and Peter A. Bancroft.

Mr. Wallace: Seaboard Surety ready, your Honor.

Mr. George C. Finn: Not ready, your Honor. We would like to make a statement, please.

The Court: What do you mean you are not ready? At the pretrial hearing there was no objection raised whatever.

Mr. George C. Finn: Your Honor, I raised the objection on our constitutional right for a trial by jury, and I wish to make a statement on that effect under Amendment VII of the Bill of Rights. It states:

"In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise in any court of the United States than according to the rules of [4*] common law."

We wish to preserve our right to trial by jury and wish to make the statement that this is a matter of a $198,000 lawsuit initiated by the Government, and as a right of a citizen we have made our demand for a trial by jury. We have never intentionally or unintentionally waived that right; nor have we ever waived any right.

The Court: I made the ruling on that previously.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

You are not privileged to bring it up again.

Mr. George C. Finn: Your Honor, may I state for the record that the objections of the Government not to try this case before a jury is a violation of our constitutional right.

The Court: As I told you at the last hearing you lost your right to trial by jury, as a matter of right, by failing to comply with Rule 38.

At your request, I stated the court would impanel a jury in an advisory capacity, since the right to trial by jury had been waived by you and all parties, the court would sit with the jury, but the jury will sit only in an advisory capacity to the court, and not as a matter of right.

A. Anything further on that?

Mr. Charles C. Finn: Yes, your Honor. That was not our request. We did not request——

The Court: You don't wish an advisory jury in the case?

Mr. Charles C. Finn: We do not wish an advisory jury. [5]

The Court: You don't wish any jury at all?

Mr. Charles C. Finn: No, your Honor, we wish a jury.

The Court: I have ruled against you, and I don't expect to rule, gentlemen, but once on one question. That has been disposed of and I don't expect to hear anything more on that.

Mr. Charles C. Finn: We would like to have a continuance until that matter can be reviewed.

The Court: The motion is denied. Do you wish an advisory jury? Do you wish the court to hear it without——

Mr. Charles C. Finn: We wish the court to hear our case before the jury as provided by the jury as provided by the Constitution. We do not feel that we waived any right to a jury. Demand for a jury is a right granted to every citizen, that the circumstances under which we have demanded a jury is entirely in accordance with the law, that Rule 38 says it is timely within 10 days within time of service of the last——

The Court: I have ruled against you. I don't care to hear anything further.

As I told you before, I am not going to run a law school in the course of this trial. You are speaking of things that are elementary, and if you had a lawyer he would tell you not to even mention it, except to make your record; and once the court has ruled, the court doesn't rule twice on the same matter. You will learn that, too. [6]

Mr. Charles C. Finn: I would like to bring up the matter——

The Court: I have gone to great lengths the other day at the pretrial hearing. I don't expect to take time this morning.

Mr. Charles C. Finn: I would like to bring up the matter of the amendment proposed by the School District, and that the Government was admitting to that amendment providing it did not open the door for trial by jury——

Mr. Abbott: At this time, the Government has a motion which it——

Mr. Charles C. Finn: May I finish?

The Court: Don't interrupt. [7]

Mr. Abbott: At this time the Government has a motion which it should address to the court.

The Court: Don't interrupt.

Mr. Charles Finn: At this time I feel that such a——

The Court: Be seated, Mr. Abbott.

Mr. Charles Finn: ——that such a proposal by the Government violated our constitutional rights, that the way was paved, and we do not concede that we waived any right. But, in addition to that, in the due process and orderly process of the court and the law, the way was paved for the opening of the door for a jury trial, which was denied us because the Government complained about the amendment of the complaint on the ground that it would open the door for a jury trial.

Now, the Government has consistently refused to have their case brought before a jury of the people.

The Court: There has been no consistent refusal.

Do you have anything further to say? I have ruled on this matter, and I don't expect to hear anything more about it. If you prefer the court to try it without even an advisory jury, you may make a motion to that effect.

Mr. Charles Finn: We do not prefer the court to try it at all without a jury, under our rights under the Constitution.

The Court: That is disposed of. It is easy to talk about your rights under the Constitution, but there is no [8] right once it has been waived. Be seated, please.

Mr. Charles Finn: We have complied with the law in every respect.

The Court: That is your opinion.

Mr. Charles Finn: In serving these briefs and demanding a jury trial within the 10-day period, as the law provides.

Mr. Abbott: May the Government be heard, based on the statements made?

The Court: No, I do not want to have a reply to incriminatory statements that are made.

Mr. Abbott: But I want to address a motion to the court.

The Court: After we have disposed of this, you will be heard.

Mr. Abbott: Thank you, your Honor.

The Court: Is there anything more that you want to say?

Mr. Charles Finn: No, your Honor.

The Court: I have ruled on it. Do you have any further motions to make? I have ruled on the jury question. I don't want to hear another word about it.

Mr. Charles Finn: Your Honor, we take the same position that we took when bail was refused.

The Court: I don't want to hear anything about the criminal case. I have told you the criminal case has absolutely no bearing upon this case. I don't want to hear [9] anything more about it.

Mr. George Finn: The principle of constitutional guarantees in both cases is the same. They are identical, your Honor, and if we take the position——

The Court: What motion are you making now?

Mr. George Finn: If we take the position in one case, we must take the position in the other case, in this case, that we cannot be denied our constitutional guarantees, that there is no way they can be denied to us.

The Court: No one is denying you any constitutional guarantees.

Mr. George Finn: Your Honor——

The Court: Do you have any further motion to make? We have a jury to select here.

Mr. George Finn: May we be excused——

Mr. Charles Finn: I would like to know whether the amendment that Mr. Blackman has made has opened the door to a jury trial.

The Court: Mr. Blackman hasn't made any amendment.

Mr. Charles Finn: He has amended his pleadings, I think, to provide for estoppel. Is that not correct?

Mr. Blackman: Your Honor has granted leave to International to amend the pleadings.

The Court: I haven't seen any pleading, and it was just the granting of an amendment to conform to the proof, was it [10] not?

Mr. Blackman: We have prepared, but we haven't as yet had an opportunity to file an amendment to our answer to set forth the equitable defense of estoppel.

The Court: I haven't allowed any amendment. I have indicated I might allow amendments later to conform to the proof.

Mr. George Finn: It is my understanding an

amendment was allowed to the answer of International to the plaintiff's complaint.

The Court: Have you seen any amendment?

Mr. George Finn: No, your Honor, I haven't seen it, but I have information from Mr. Blackman that he would so amend.

The Court: He has not so filed. If an amendment is received and filed, the matter may be set at large. I am not ruling as to that.

Mr. Charles Finn: Well, may we have a continuance until such an amendment is filed and served?

The Court: No, the case is going to trial this morning on the pleadings that are here.

Now, I haven't heard any of the other parties. They may have some motions to make, too.

Mr. Charles Finn: Before the case goes to trial, your Honor, we would like to have a jury trial.

The Court: I have heard from you on that, and until the [11] situation changes I propose to hear nothing further on the subject.

Mr. George Finn: Your Honor, we must take the same position consistently.

The Court: You have made your record on it. You have made your motion. You don't have to jump up every time something comes up and make the same argument.

Mr. George Finn: I maintain we must maintain the same position.

The Court: It will be understood without your repeating it throughout this trial, every minute of this trial, that you are demanding a trial by jury. Is that understood?

Now I don't want to hear anything more about it unless the pleadings situation changes. If you are going to act as your own lawyer, I will have to treat you as a lawyer.

Mr. Charles Finn: We have been treated that way.

Mr. George Finn: Your Honor, I would like to make a motion that the Finns be excused without any detriment to their rights in this matter.

The Court: No, the Finns will be present. Both of you gentlemen will be present throughout this trial.

Mr. George Finn: We do not wish to go to trial, your Honor, in violation of what we consider to be our constitutional rights, the same as when we were refused bail.

The Court: Be seated. [12]

Mr. Charles Finn: And we are here by order of the court?

The Court: Yes, throughout this trial, and you will be in contempt of court if you absent yourselves from the trial.

Mr. George Finn: For the record, we are not representing ourselves in the trial. We are not being represented in the trial. We are objecting to such a trial without our constitutional rights being preserved.

The Court: Be seated.

Mr. Abbott: At this time the Government has a motion which, with propriety, I request should be addressed to the court.

The Court: Please make it from the lectern, Mr. Abbott.

Mr. Abbott: The motion being made by the Government, your Honor, is one which I cannot make with propriety in the presence of the panel.

The Court: Why wasn't it made at pretrial?

Mr. Abbott: It is a motion occasioned by the remarks of the defendants Finn just concluded, your Honer.

The Court: I don't propose to hold any bench-side conferences on the subject, Mr. Abbott. I expect to impanel a jury and proceed in this matter this morning.

Mr. Abbott: This is a matter I am duty-bound to present to the court.

The Court: You may present it in writing.

Mr. Abbott: It is a matter, your Honor, which relates [13] to the misconduct on the part of the defendants Finn in the face of the court and in the face of the panel of the jury in their remarks just concluded, which were misleading, false, and inflammatory.

The Court: That is the trouble about having laymen trying to try their lawsuits. I suppose the doctors would have the same trouble in the hospital if they had patients up there trying to cut out their own appendixes. It is the same idea. And, of course, if a lawyer had said what they had said, the lawyer would be on his way to jail right now.

Mr. Abbott: I quite agree.

The Court: But I have to make some allowances for ignorance.

Mr. Abbott: But is the Government in its presentation to be prejudiced by the conduct of the defendants?

The Court: No. I expect the jury to have common sense, and they have common sense. I can appreciate your making the motion, but there is no necessity of making it at the bench.

Mr. Abbott: For the record, then, the motion is that this panel be discharged and that a new panel be called.

The Court: The motion is denied. If the jury were a matter of right, I would grant the motion, but this is to be an advisory jury, advisory to the court, and I shall trust the panel.

Mr. Abbott: Then will the court instruct the panel that [14] the statements made by the defendants Finn were not true, and that they have no bearing upon this case?

The Court: I will instruct the panel that all statements and comments of counsel and the parties who try to act as their own counsel are not evidence in the case, nor are the comments of the court, and they are to be disregarded entirely.

The jury to be chosen is to make its findings upon the evidence in the case, and not upon sometimes unsupported statements of the parties and counsel.

Mr. George Finn: Your Honor——

The Court: Are there any other motions before we proceed to impanel an advisory jury?

Mr. George Finn: Your Honor, I make a motion to strike the last comment as to acting as our own counsel.

We do not desire to act as our own counsel. It is necessary as a matter of circumstance, and it is not upon our own volition. It is because of the lack of finances only.

The Court: I appointed an attorney to represent you, the attorney who represented you in the criminal case to which you have referred here, and you filed an affidavit, both of you, stating that your constitutional right was to be free to act as your own attorneys and to act for yourselves. Didn't you?

Mr. George Finn: Your Honor, there was an affidavit as [15] to counsel of our own choosing. The court appointed a counsel who didn't wish to act for us, and we are under obligation, moral obligation, not to demand the time from that counsel.

We have no objection to the counsel, your Honor, other than we are morally obligated not to use him in any capacity because he has served in the past to our benefit, has been our friend, and while the action of this court may have been to help us, it has tended to destroy our friendship and to change our whole approach on counsel in this matter. There isn't an attorney in town who has offered before to help us who has offered since, because they have some fear that they will be drawn into the case.

The Court: And they don't want to help you, then if they fear being drawn into the case. The only way they can help you is to come here and represent you.

Mr. George Finn: There are many ways they

could have helped us, and others have volunteered, and because we had the Cohns, we wouldn't accept the voluntary service, and since the Cohns have been pushed into the case, these other people have declined, and we are wholly without counsel, and without any possibility of obtaining counsel.

The Court: But it is your own fault. Mr. Cohn was satisfactory to you in the criminal case, and you voiced no objection to it until after I had appointed him to represent you. Then you came in with an affidavit saying that you had [16] the constitutional right to select your own attorney, which is true. Then I appointed Mr. Cohn as a friend of the court, so he would be available to assist you.

Mr. George Finn: Yes, your Honor.

The Court: But you have never chosen to make use of his services. You preferred, both of you, to stand up and act as your own lawyers. Now, if you are going to act as your own lawyers, I would expect you not to complain about it. You can't have your cake and eat it, too.

Mr. Charles Finn: Your Honor, may I explain the situation?

The Court: No, nothing further on that. The motion is denied.

If there are any other motions you wish to make, you may make them.

Mr. Charles Finn: I respectfully request the court to clarify this position with respect to Mr. Cohn, and in all due respect to Mr. Cohn, because he has been a very fine person, a very fine friend.

The Court: Mr. Cohn is not on trial here.

Mr. Charles Finn: I meant in fairness to the court. He is a very ethical man.

The Court: No one is questioning that. I have heard no one questioning that.

Mr. Charles Finn: He has done a good deal for us. At [17] the time Mr. Cohn was appointed it was not Mr. Cohn's wish to serve in that capacity.

The Court: Yes, I recall that. [18]

Mr. Charles C. Finn: And if we forced him to serve in that capacity it would subject Mr. Cohen to arrest in contempt of court if he should refuse our request. We could not bring such an imposition on Mr. Cohen. It would have ruined his law practice.

The Court: I don't care to hear anything more about that. That is disposed of.

Any further motion? Ready to have a jury called, gentlemen?

Mr. Abbott: We are ready, your Honor.

Mr. Nelson: Ready, Your Honor.

Mr. Blackman: Ready, your Honor.

Mr. Wallace: Ready, your Honor.

Mr. Charles C. Finn: Not ready, your Honor.

Mr. George C. Finn: Not ready, your [19] Honor.

(Thereupon the court interrogated the jury panel.)

The Court: Are there any further questions which counsel for the Government would have the court put to the panel?

Mr. Abbott: No further questions, your Honor.

The Court: The defense?

Mr. Nelson: No further questions for the School District, or for Mr. Bancroft.

Mr. Wallace: No questions for Seaboard Surety.

Mr. Blackman: No questions.

The Court: The defendants Finn?

Mr. Charles Finn: We are here only by order of the court, your Honor.

The Court: Mr. Clerk, did the defendants Finn receive a copy of the jury list?

The Clerk: Yes, your Honor.

The Court: Very well. Gentlemen you are entitled to three challenges to a side, and I will allow the defendants Finn three separate challenges of their own.

Do the defendants Finn have a copy of the jury list?

Mr. George Finn: No, your Honor.

The Court: The clerk stated he turned over to you a copy. Did you fill it in? Did he explain what to do about it?

Mr. Charles Finn: No, your Honor.

The Court: Do you wish to have it explained to you [20] again?

Mr. Charles Finn: We are just taking the position we are here just by order of the court.

The Court: Do you wish to exercise any challenge?

Mr. Charles Finn: We have no further statement to make, except we are here by order of the court. We aren't participating here.

The Court: You had better participate. I don't

know who is going to represent your interest if you don't. The court can't act as attorney for any of the parties.

Mr. George Finn: Your Honor, our interest is not in the airplane primarily. Our first interest is our constitutional guarantees. When we fought a war, we didn't know anything about the rules.

The Court: I don't want any of that flag waving here. This is just a suit over a piece of property. It has nothing to do with waving the flag.

Mr. George Finn: It has to do with my constitutional rights which I insist be protected.

Mr. Charles Finn: We are in the court of the United States.

The Court: You don't need to remind me of that.

Mr. Charles Finn: Under the Constitution——

The Court: You have been here several days through pretrial hearings, and you have been conducting yourselves like [21] gentlemen, and now because we get an audience I don't want you to change your course of conduct.

Mr. Charles Finn: We don't want to change our course of conduct, your Honor. I feel we are still gentlemen. We have always been gentlemen.

The Court: You gentlemen may mark your jury lists, sign them, and hand them to the clerk. The first thirteen names without a challenge will serve as the jury and as the alternate.

Are all the challenges in, gentlemen?

(Thereupon the documents were handed to the clerk.)

(Thereupon the jury and one alternate selected were duly sworn.) [22]

The Court: Does the Government wish to make an opening statement?

Mr. Abbott: The Government does, your Honor.

Mr. Charles C. Finn: Before you proceed, may I ask the court a statement?

The Court: Yes.

Mr. Charles C. Finn: We appreciate that our rights can be adjudicated in this matter along with the rights of the others, and that if such an adjudication is in our favor, if we get the airplane or even a large sum of money, it would not be satisfactory. We do not want those things in lieu of our constitutional right and guarantee of trial by jury. Any decision by this court will not be satisfactory in lieu thereof.

The Court: Well, of course the court doesn't go around asking anyone to approve its decisions, Mr. Finn. If the court did there would always be at least one side in every case who would be dissatisfied; never get approval.

You are here in this case and the case has been pending a long time, and we are going to trial. It's been agreed all along. We have been in pretrial conferences here and there has never been any objection to this trial date, and you will be here. This is your one chance to have your day in court. If you don't wish to participate, that is your privilege.

Mr. Charles C. Finn: We wish to submit, your

Honor, that [23] we feel we have been manipulated out of a jury trial, which our constitutional rights provide, by the refusal to admit certain amendments which would open the door to a jury trial, by the Government refusing to submit its case to a jury and——

The Court: I will hear no more on that subject.

Mr. Abbott: Your Honor, the Government cites——

The Court: The next time I hear from you on that subject there will be something more to be said. I make allowances to some things, but——

Mr. Abbott: The Government cites Mr. Finn's statements as made as misconduct, and moves the court for an order of mistrial.

The Court: The motion will be denied. I will rely upon the good sense of this jury to disregard all of this kind of talk. It is the kind of talk that lawyers are trained not to make in the presence of the jury. Because it brings in extraneous matters. We have enough difficulty focusing our attention upon the evidence in the case.

These defendants are laymen. They have chosen to represent themselves here, and that is their right. They are entitled to do it.

I will ask the jury to disregard all of these comments of the court and counsel, unless as I say, there is a stipulation as to certain facts. You just regard it as so much chaff that you have to separate from the grain in your quest [24] for the truth as to the facts here.

Mr. Charles C. Finn: Your Honor——

The Court: Proceed with your opening statement, Mr. Abbott.

But before you do—Mr. Clerk, is there any occasion to require the further attendance of any members of the jury panel?

The Clerk: No, your Honor.

The Court: All members of the jury panel who have not been chosen to serve in this case are now excused until you are again called. The court appreciates you coming here and making your services available.

You may proceed, Mr. Abbott.

(Whereupon the opening statement on behalf of the plaintiff as made by Mr. Abbott.) [25]

(Opening statement on behalf of the Vineland Elementary School District and Peter A. Bancroft by Mr. Nelson.)

The Court: Do you wish to make an opening statement, Mr. Blackman, or you, Mr. Wallace?

Mr. Blackman: I do, your Honor, but in view of the hour, does your Honor think it might be reserved until after the recess?

The Court: We will take the noon recess.

Ladies and gentlemen, before we do, I would admonish you of your duties not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of this trial, and not to form or to express an opinion on the case until after it has been finally submitted to you for your verdict.

That admonition, because of its manifest impor-

tance, I will give to you each time before we separate at the noon recess and adjournment time. You are not to permit anyone to communicate with you in any way, by newspaper, radio, or television, or in any other way on any subject touching the merits of this trial. You are not even to communicate among yourselves on any subject touching the merits, but are to keep an open mind until all the evidence is in and until you have heard the summations of counsel, and the instructions of the court, and are not to form or express an opinion on this case until after it has been finally submitted to you [26] for your verdict.

You are now excused until 2:00 o'clock this afternoon.

The court remains in session, gentlemen, until the jury have retired.

(Thereupon the jury retired from the courtroom.)

The Court: Recess until 2:00 o'clock.

(Whereupon, at 12:05 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same date.) [27]

Wednesday, October 27, 1943; 2:00 P.M.

The Court: Any ex parte matters?

The case on trial, is it stipulated, gentlemen, the jury are present?

Mr. Abbott: So stipulated.

Mr. Nelson: So stipulated.

Mr. Blackman: So stipulate.

Mr. Wallace: So stipulated.

The Court: Is it stipulated the jury are present?

Mr. George C. Finn: Our jury is not present.

The Court: I said "the" jury are present. Whether you stipulate or not, the record will show that the jury are present.

Mr. George C. Finn: Yes, your Honor.

Mr. Charles C. Finn: We do not so stipulate, your Honor.

The Court: Very well. I only asked the stipulation as a matter of form. I don't even need to look at you gentlemen. I will merely say, the record will show that the jury are present.

Now, be seated

Mr. Charles C. Finn: Thank you.

The Court: Any of you wish to make an opening statement?

Mr. Blackman: If the court please, first, your Honor, [28] if I may move this lectern back a little bit out of my way. Out of sight is out of mind, and I don't want to be left out of mind in this case.

The Court: You may move it wherever it is most convenient.

Mr. Blackman: Thank you, your Honor.

(Opening statement on behalf of defendant International Airports by Mr. Blackman.) [29]

The Court: Does the defendant George C. Finn wish to make an opening statement?

Mr. George C. Finn: You Honor, we are here only by order of the court.

The Court: Here is your chance to get up and talk for an hour, if you want to, and show the jury what you expect to prove.

Mr. George C. Finn: If we had a jury, your Honor, we would talk for an hour;——

The Court: Are you speaking for both of you?

Mr. George C. Finn: ——two hours.

The Court: What about the defendant Charles C. Finn?

Mr. Charles C. Finn: I am of the same opinion, your Honor.

The Court: Here's your opportunity to make an opening statement to this jury on whatever you expect the evidence on your behalf will show in this case.

Mr. Charles C. Finn: We submit, your Honor. We don't have the opportunity to try our case before a jury; that this is a court trial and not a jury trial, inasmuch as the jury is an advisory jury.

The Court: Very well. This is your chance to make any opening statement you wish.

Mr. Charles C. Finn: Your Honor, we have no statement to make whatsoever, except we are here by order of the court. [29-A]

The Court: Very well. I don't expect to offer you an opportunity every hour on the hour, or anything like that. I expect you to represent yourselves. I have enough to do to preside over the trial, and I won't make any further offers to you, unless the law requires, in view of your statement. If you have anything further to say, you address the court just as any lawyer or any other party.

Does Seaboard Surety Company have an opening statement to make?

Mr. Wallace: Yes, if the court please.

(Opening statement of defendant Seaboard Surety Company by Mr. Wallace.)

The Court: Any further opening statements any party desires to make?

If not, the Government may call its first witness.

Mr. Nelson: If the court please, I have one matter which I would like to bring to the attention of the court before we get into the trial of this case, and that is, the School District being here from Bakersfield, we don't have our own stenographic help. There have been a few clerical errors appear in our memorandum of facts and law brief. For the record, we would like to clear them up.

The Court: Do you wish to call in the copies, and——

Mr. Nelson: If we could point out the page and word at this time and the parties make the corrections—— [30]

The Court: How many are there?

Mr. Nelson: I don't believe there are too many; approximately eight of them, your Honor.

The Court: Very well. You may go through them, seriatim, and call attention to them.

Mr. Nelson: This is our amended statement of facts and memorandum of law.

The Court: Filed when?

Mr. Nelson: I believe it was Monday. Yes, that was the 25th.

On page 4 of those facts, line 28, the word "not" should appear after the last word in that sentence. "The Finns were not * * *"

The Court: Next?

Mr. Nelson : The next correction, your Honor, is in the memorandum of law on page 1.

The Court: Another document?

Mr. Nelson: It is the one attached to the statement of facts, your Honor.

The Court: Very well.

Mr. Nelson: On page 1, line 14, the word "implied" should be changed to "implemented."

The Court: Next?

Mr. Nelson: Page 4 of the same memorandum of law, line 14, before the word "mutilated" should appear "sold," s-o-l-d, [31] "if sold"—"sold if mutilated * * *"

The Court: Next?

Mr. Nelson: Page 6, line 8, the word "from" in the middle of that line should be changed to the word "form."

Page 9, line 17, where a period appears; it should be a comma. That is not two sentences, and runs right on.

Page 10, line 22, the word "e-i-g-h-e-r," should be "either"—typing error.

Line 32 should have after the statement, "civil code section," figure "3539."

Page 11, on line 27, should be inserted after "exhibit A," the words "for identification." [32]

Page 13, line 13, the words at the beginning of that line "purchased or" should be changed to "purchaser of."

And on line 5 of the same page after the word "reservation" and before the word "title" at the end of that line should be inserted the word "of."

On line 13, at the end of the line after "measure of damages" the word "if" should be changed to "is."

Now, we hate to toss the blame on our secretarial help here in town, because they certainly did very well——

The Court: You don't need to place the blame anywhere. Is there any objection to the amendments being made?

Mr. Abbott: No objection.

The Court: It is ordered that the changes may be made by interlineation, and you may make them on the originals, Mr. Nelson, and place your initials and the date thereon.

Mr. Nelson: Thank you, your Honor.

The Court: I want the record to show that Mr. Cohn, who was appointed by the court to represent the defendants Finn and also as a friend of the court is here in attendance throughout these proceedings.

Mr. Abbott: May it please the court. At this time the Government will offer in evidence Plaintiff's Exhibit 2 RFC aircraft appraisal sheet, dated March 23, 1946, and Plaintiff's Exhibit 6, individual aircraft record card.

The Court: Any objection to the offer? [33]

Mr. Nelson: No objection, your Honor.

Mr. Blackman: No objection.

The Court: Is there a stipulation that the documents are genuine in all respects in which they purport to be?

Mr. Abbott: So stipulated.

Mr. Nelson: So stipulated.

Mr. Blackman: So stipulated.

The Court: They are received in evidence.

Mr. Abbott: I will request that the documents be handed to the jurors for their inspection.

The Court: Let's not take the time at the present time. Let's get the evidence in, and then you may pass it to them at the appropriate time. Exhibits 2 and 6 are received in evidence.

(The documents referred to, marked Plaintiff's Exhibits Nos. 2 and 6, were received in evidence.)

The Court: Any other offer?

Mr. Abbott: Not at this time.

The Government will call Mr. Peter A. Bancroft. Take the witness stand, please, Mr. Bancroft.

PETER A. BANCROFT

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, [34] please?

The Witness: Peter Bancroft.

The Clerk: Be seated, please.

(Testimony of Peter A. Bancroft.)

Direct examination

By Mr. Abbott:

Q. What is your occupation, Mr. Bancroft?

A. School superintendant.

Q. And you are superintendent of what school?

A. The Vineland School District.

Q. How long have you held that position, sir?

A. Ten years.

Q. Is the Vineland School District a school district organized pursuant to the laws of the State of California, Mr. Bancroft? A. It is.

Q. And has been for the entire time that you have held that position; is that correct?

A. Yes, sir.

The Court: What type of district is it, Mr. Bancroft?

The Witness: It is an elementary public school district, your Honor.

The Court: Will it be stipulated, or will the stipulation be offered as to the provisions of the Code under which it is organized?

Mr. Nelson: So stipulated, your Honor.

The Court: What are the provisions? [35]

Mr. Nelson: Where are they?

The Court: What are they? Will you specify the provisions of the Code?

Mr. Nelson: I can obtain that, your Honor. Offhand I couldn't point them out. There are approximately 12 different types of districts.

The Court: I have that in mind. That is the

(Testimony of Peter A. Bancroft.)

reason I don't want to read all of them. I want just the one.

Mr. Nelson: I will bring them in.

Q. (By Mr. Abbott): Calling your attention to the spring of 1946, Mr. Bancroft, were you actively engaged in your duties as superintendent of the school at that time? A. Yes, sir.

Q. And did you at that time engage in correspondence with a Mr. Heddleston, director Educational Aircraft Disposal Division, Office of Aircraft Disposal, War Assets Administration, United States Government? A. Yes, sir.

Q. Generally speaking, was that correspondence directed to the subject of possible acquisition of aircraft by Vineland from the Government, pursuant to the Surplus Property Act of 1944?

A. Yes, sir, it was.

Q. Did you receive through the mail from Mr. Heddleston certain forms to be completed by you, Mr. Bancroft? [36]

A. We received quite a number of forms from Mr. Heddleston.

Mr. Abbott: I will request that the clerk provide Plaintiff's Exhibit 1, for identification.

The Court: Do you wish it placed before the witness?

Mr. Abbott: And that it be placed before the witness, your Honor.

The Court: Do you have Plaintiff's Exhibit 1 before you, Mr. Bancroft?

The Witness: Yes, your Honor.

(Testimony of Peter A. Bancroft.)

The Court: Have you had an opportunity to examine it?

The Witness: Yes, your Honor.

The Court: What is your question?

Q. (By Mr. Abbott): Was that form received by you through the mail from Mr. Heddleston in the spring of 1946, Mr. Bancroft?

A. I am not certain whether this form was received in the mail or picked up by me from the War Assets Office in Los Angeles, Mr. Abbott. It was, however, signed by me.

Mr. Abbott: Will you please place before the witness Defendant Vineland's Exhibit D, for identification?

The Court: Do you have before you Vineland's Exhibit D, for identification,—the purchase order?

The Witness: Yes, your Honor.

The Court: Have you had an opportunity to examine it? [37]

The Witness: Yes, your Honor.

The Court: What is your question?

Q. (By Mr. Abbott): Did you receive Vineland's Exhibit D, which you are now inspecting, through the mail from Mr. Heddleston?

A. Mr. Abbott, this could have been the same situation as with the agreement. It is possible that I received it in the mail or from War Assets office in Los Angeles.

The Court: In any event, you received it?

The Witness: Yes, sir.

The Court: In the month of June, 1946?

(Testimony of Peter A. Bancroft.)

The Witness: Yes, your Honor.

Mr. Abbott: Solely to refresh your memory with respect to the subject matter of the last two questions, Mr. Bancroft, I will ask the clerk to mark for identification a letter dated May 27, 1946, addressed to you and purportedly executed by Mr. R. A. Heddleston.

The Court: Is it material how he received them? Just that he did receive them?

Mr. Abbott: It is material that he received them from Mr. Heddleston at Washington, your Honor.

The Court: Very well.

Mr. Abbott: I will ask the letter last described be marked as Plaintiff's next in order, for identification, and that it be placed before the witness. [38]

The Court: It will be so marked. Plaintiff's Exhibit 8, Mr. Clerk?

The Clerk: Yes, your Honor, Plaintiff's Exhibit 8.

The Court: 8, for identification.

(The document referred to was marked Plaintiff's Exhibit No. 8 for identification.)

The Court: Have you examined Exhibit 8, for identification?

The Witness: Yes, your Honor.

The Court: What is your question?

Q. (By Mr. Abbott): Does examination of that document, Mr. Bancroft, refresh your recollection, so that you are able to state whether or not you received Plaintiff's 1, the agreement form, and

(Testimony of Peter A. Bancroft.)

Vineland's D, the purchase order, through the mail from Mr. Heddleston at Washington?

A. This letter, Mr. Abbott, states they were sent to me. I still don't remember whether I got them in the mail or from the office in Los Angeles.

Q. Had your correspondence up to the date of receipt of those forms been with any person connected with War Assets other than Mr. Heddleston?

A. I am not certain on that. Most of it was with Mr. Heddleston.

Q. Did you on or about June 25, 1946, complete and sign Exhibit 1, for identification, and return it to Mr. [39] Heddleston? A. Yes, sir.

Q. At Washington? A. Yes, sir.

Q. Did you on that same date complete purchase order form, which is Vineland's D, for identification, and return it also to Mr. Heddleston?

A. Yes, sir.

Q. Now, calling your attention to the date of July 10, 1946, did you on or about that date pay $300 to War Assets Administration at Ontario, California?

A. I am not certain as to the date.

Mr. Abbott: Will the clerk please place before the witness International Airport's Exhibit A, for identification?

The Court: What portion of the exhibit do you wish to direct the witness' attention to?

Mr. Abbott: The document is quite short, your

(Testimony of Peter A. Bancroft.)

Honor. It is entitled "Sales Receipt," and bears the date July 10, 1946.

The Witness: Would you restate your question again, please, Mr. Abbott?

Mr. Abbott: Will the reporter read it, please?

(The record was read.)

The Court: Are you calling the witness' attention to the document entitled "Sales Receipt"? [40]

Mr. Abbott: I am, your Honor.

The Court: Do you have it before you?

The Witness: Yes, your Honor.

The Court: What is the date of it?

The Witness: The date is July 10, 1946.

Q. (By Mr. Abbott): Now, does that document refresh your recollection to the extent of permitting you to state whether or not on July 10, you paid $300 to War Assets Administration at Ontario, California? A. Yes, sir.

The Court: Did you?

The Witness: Yes, sir.

Q. (By Mr. Abbott): Did you personally travel to Ontario, California, to make that payment, or was it made by mail, Mr. Bancroft?

A. To the best of my recollection, it was made by me personally at Ontario, but I am not positive of that.

Q. Do you know the person, R. P. Bates, whose name apparently has been affixed to the document you are inspecting, International Airport's Exhibit A, for identification?

(Testimony of Peter A. Bancroft.)

A. I believe I have met Mr. Bates, but I would like to clarify this. This is a number of years ago.

Q. Did you meet Mr. Bates in connection with the payment of $300 to him for War Assets Administration on July 10, 1946? [41]

A. It is quite possible, but I am not positive at this time.

Q. Would that have been your only dealing with Mr. Bates? A. That I couldn't be sure of.

Q. Could that have been your only dealing with Mr. Bates relating to the aircraft in suit?

A. There were a number of aircraft on the field at that time, as well as engines, propellers, and other instruments, and it may be that we had a number of discussions. I am not even positive that Mr. Bates was at Ontario at the time. I don't recall.

Q. Calling your attention to July 25, 1946, did you travel to Ontario, California, on that date with a Mr. J. D. Poole?

A. That I don't remember.

Mr. Abbott: May the witness be shown Plaintiff's Exhibit 4, for identification, please?

(The document was placed before the witness.)

Q. You now have before you Plaintiff's Exhibit 4, for identification, a form entitled "Release of Custody of Aircraft." Have you seen that form before, Mr. Bancroft?

A. I don't remember seeing this form before, no, sir.

(Testimony of Peter A. Bancroft.)

Q. Does the date on the form or any other material on the form refresh your recollection as to a trip you may have [42] made to Ontario, California, in the month of July 1946?

A. No, sir, it doesn't. With regard to Mr. Poole, who was the pilot of this aircraft, as I recall my only meeting with Mr. Poole was at the time that he flew the aircraft to our school. [43]

Did that occur in late July 1946, sir?

A. Well, I need help with that date, too.

Q. It is for that purpose you have been shown the form now before you. In that connection, was Mr. Poole employed by the Vineland Elementary School District to ferry the aircraft?

A. I believe he was.

Q. Did you go with him on the occasion when he did ferry the aircraft? A. Yes, sir.

Q. And were you with him constantly on that date?

A. Only during the time of his flying the airplane. We didn't leave from Ontario. We left from another field about 15 or 20 miles East of Ontario; I believe it was there that I met Mr. Poole and we picked up the plane at that place. I don't know why it was transferred from Ontario. But we picked it up and flew it to a strip just South of our Sunset School, and as soon as he left the plane, I saw him no more that day.

Q. Mr. Bancroft, has the Vineland Elementary School District ever received from the United States a bill of sale to the aircraft in suit? Which

(Testimony of Peter A. Bancroft.)

aircraft can be more particularly described as "Army Air Force identification No. 42-3645."

Mr. Blackman: To which we object on the ground that the document speaks for itself, and we believe——

The Court: Sustained. [44]

Mr. Blackman: ——calls for a——

Mr. Abbott: In that connection, there is no document before the witness which even vaguely resembles a bill of sale.

The Court: Ask him what he received from the Government. Show the affirmative instead of attempting to show the negative.

Q. (By Mr. Abbott): Did you receive the document entitled "Sales Receipt," dated July 10, 1946, International's Exhibit A for identification, from some person employed by the War Assets Administration, Mr. Bancroft?

A. May I see that document, too, please?

Mr. Abbott: That document is before you.

The Court: July 10, 1946, when you paid the $200, did some official of the War Assets Administration give you that sales receipt?

The Witness: Must be. My name is on it.

The Court: Your answer is yes?

The Witness: Yes.

The Court: Did you receive any other document in connection with the transaction?

The Witness: That I don't recall, your Honor.

The Court: What is your best recollection?

(Testimony of Peter A. Bancroft.)

The Witness: I don't recall any other, your Honor.

The Court: As far as you recall there was no other, is that it? [45]

The Witness: Yes, your Honor.

Q. (By Mr. Abbott): Did the Vineland Elementary School District receive either the original or a copy of the document entitled "Release of Custody of Aircraft," dated July 25, 1946, Plaintiff's Exhibit 4 for identification, a copy of which is now before you?

A. No. I have never seen this form before, that I can recall.

Q. Are you sufficiently familiar with the files of the Vineland Elementary School District to state whether or not they would contain a copy of that form? A. I am familiar——

Mr. Nelson: If the court please, in order to speed this matter up, I have so found that document, I believe, or a copy thereof in our file.

The Court: You offer a stipulation?

Mr. Nelson: We will stipulate the District did receive a "Release of Custody" document——

The Court: All of us can appreciate this happened more than eight years ago and a great many things have happened since this. Isn't that right?

The Witness: Yes, sir.

The Court: If you can offer that stipulation——

Mr. Nelson: I would so stipulate.

The Court: You stipulate to what? [46]

Mr. Nelson: That the Vineland School District

(Testimony of Peter A. Bancroft.)

did receive a "Release of Custody" document, which is being referred to by Mr. Abbott.

The Court: Being Exhibit——

Mr. Abbott: Plaintiff's Exhibit 4 for identification, your Honor.

The Court: Is that embraced in your stipulation?

Mr. Nelson: Yes, your Honor.

The Court: You accept the stipulation?

Mr. Abbott: So stipulate.

The Court: All counsel so stipulate? Whenever a stipulation is offered by any counsel and accepted by one, gentlemen, I shall assume that all join in the stipulation unless you expressly dissent. Is that understood? That applies to the defendants Finn, as well.

Mr. Charles C. Finn: Your Honor, we would like to stipulate that we do not enter this situation except by order of the court.

Mr. George C. Finn: We neither accept or deny the stipulation.

The Court: You do not stipulate and you do not dissent?

Mr. Charles C. Finn: We have nothing to say in that regard.

The Court: Very well. Are you offering Exhibit 4 in evidence. [47]

Mr. Abbott: It will be offered together with other documents relating to the aircraft in a short time, your Honor.

The Court: Very well.

(Testimony of Peter A. Bancroft.)

Q. (By Mr. Abbott): A moment ago, Mr. Bancroft, you testified there was a flight of an aircraft from a point within 15 or 20 miles from Ontario to your school district. Was that aircraft 42-3645, the aircraft in suit? A. Yes, sir.

Mr. Abbott: May it be stipulated, as it was at the time of the pretrial hearing, that the aircraft in suit, and that term will be used in this proceeding, is in fact the aircraft designated by Air Force identification No. 42-3645; further designated by manufacturer's serial No. 1-232; and by C.A.A. No. N-111H?

The Court: Gentlemen, you will have to bear in mind that the defendants Finn are not participating in the trial, as far as I understand their announcement. So you will have to rely entirely upon the stipulations they made at the pretrial hearing.

Mr. Abbott: I wish to present the stipulation at this time, your Honor, because the jury may be assisted by it in following the evidence.

The Court: Yes, but I call your attention to the fact that the defendants Finn are not joining in any of these stipulations. So the content of them, as far as they are [48] concerned, will have to be governed by what they stipulated to at the pretrial hearing.

Mr. Abbott: Then we ask the court instruct the jury there was a stipulation as last stated.

The Court: The Government, of course, recollects there were so many stipulations and so many documents. I don't have the memory. If you call it

(Testimony of Peter A. Bancroft.)

to my attention by an official record, you may read the record of the stipulation made at the pretrial hearing, if you feel so disposed.

Has it been transcribed?

Mr. Abbott: It has, your Honor. And, Mr. Manuel, would you find that stipulation?

The Court: This is a perfect illustration of the misfortune of not reducing it to writing and having it signed by all parties.

Mr. Abbott: The stipulation is quite lengthy and the transcript has been completed within the last few days, your Honor.

Q. (By Mr. Abbott): Mr. Bancroft, are you acquainted with the defendants George C. Finn and Charles C. Finn? A. Yes, sir.

Q. When did you first meet those individuals?

A. Approximately?

Q. Yes, certainly.

A. I'd say sometime during the year 1950. [49]

Q. Was it approximately in the fall of 1950, sir?

A. I'd rather not try to pin down dates because that far back they are very hazy.

The Court: Before you go into this, we will take the afternoon recess.

You are excused, ladies and gentlemen, for a recess of five minutes, subject to the usual admonition.

You may step down.

The Witness: Thank you.

The Clerk: The court remains in session.

The Court: Court remains in session until the

jury have retired. That is printed and put on every counsel table, and I take it it is still there. It has been there for years.

(Whereupon the jury retired from the courtroom.)

The Court: Stipulated, gentlemen, the jury have left the courtroom?

Mr. Abbott: So stipulated.

Mr. Nelson: So stipulated.

The Court: Let the record so show.

If you have a transcript of these stipulations that were made at the pretrial hearing by the defendants Finn and the other counsel, if you so desire, if you supply me with the information, I will instruct the jury as to each, on the appropriate occasion, that the defendants Finn did so stipulate at the pretrial hearing. [50]

Mr. Abbott: In that connection, your Honor, the transcript was prepared at the request of the Government and the Vineland School District and I assume a copy is in the hands of the court.

The Court: I haven't seen it. Never make any such assumption as that. Don't assume I have anything. I have never seen anything like a transcript in this case.

Mr. Abbott: The custom has been that when the reporter furnishes a transcript, he prepares one for the judge.

The Court: I don't think he does, unless you buy it.

Mr. Abbott: An extra copy was ordered.

The Court: I haven't seen it .

We will recess for five minutes.

(Short recess taken.) [51]

The Court: Let the record show the jury is present. Do any other parties expect to call either of the defendants Finn as witnesses in this case?

Mr. Abbott: The Government does not, unless they take the stand and it is necessary to later call them with respect to matters to which they have testified.

The Court: During the recess I want to say I didn't quite realize from the remarks made the position taken. Do I understand your position, Messrs. Finn, is that you are only in attendance here by reason of the order of court? Is that correct?

Mr. Charles Finn: That is correct.

The Court: This is a civil trial, and the record will show that you can absent yourselves voluntarily if you like. Any time you want to go, you just leave.

Mr. Charles Finn: We have been here by order of the court, your Honor. Are we to leave by order of the court?

The Court: No, no. This is a civil trial, and you may remain in attendance if you like. But if

a party wants to go off in default in a civil action, it is his privilege to do so.

Mr. Charles Finn: Are we to understand that the court has rescinded its order that we are required to stay here?

The Court: Yes. Since you are not required as witnesses you are not required to remain. I am not ordering you to [52] leave. You are at liberty to stay, but the court never orders a party to remain in a civil suit unless he is called as a witness. This is a civil trial, and you are free to remain or go, as you like.

Mr. George Finn: Are we to understand, your Honor, it constitutes a default if we go?

The Court: It may. I do not attempt to advise you as to the consequences.

Mr. Charles Finn: We were under the impression the court had ordered us to be here during the trial.

The Court: I realize that by the statement that was made that you were here by order of the court. So you are not here by order of court in the sense you are required to stay. You can come and go as you like. I don't know what you can accomplish by your absence, but if you go the record will show you voluntarily absent yourself, and you will take the consequences, but one of them will not be contempt of court because of any order requiring you to remain, and any order heretofore made, will be rescinded, if made.

Mr. George Finn: That is what I want to know.

(Testimony of Peter A. Bancroft.)

The Court: I don't know that any such order was made.

Mr. George Finn: Your Honor, we will take cognizance of the court's remark on losing any rights.

The Court: You understand the trial will go on, and whether you are here or not, you will be legally bound by [53] any judgment that is settled.

Mr. George Finn: I take the position that we never waived any rights voluntarily.

The Court: I do not care to hear any argument about it. I am just merely telling you that there is no restriction on your motion or locomotion, so far as this court is concerned. You may come and go as you please.

Mr. George Finn: Thank you, your Honor.

The Court: You may proceed with your evidence.

Mr. Abbott: Will you take the stand again, Mr. Bancroft?

(The witness resumed the stand.)

Q. (By Mr. Abbott): At the close of the session just prior to recess there were questions asked relative to your first meeting with the defendants, George C. Finn and Charles C. Finn, Mr. Bancroft. Can you now recall the circumstances under which you first met them?

A. Yes, sir. I believe they were, the first time I met them, interested in surplus property aircraft which our district had.

(Testimony of Peter A. Bancroft.)

Q. Was that a meeting in the offices of the district?

A. No, sir, I believe it was probably informally. They just stopped by the school and inquired about aircraft we had on our school site.

Q. In any event, was that meeting before December of 1950? [54]

A. To my best recollection, it was.

Q. Did you on that occasion have any discussion with either of the Finns relative to a possible sale by the school district of the aircraft involved in this action?

A. It is quite possible. I think they inquired about aircraft generally.

Q. Was that inquiry one as to whether aircraft were for sale by the school district?

A. Yes, sir.

Q. Was there any offer made by the district or by the Finns at that time for purchase of an aircraft? A. Not to my recollection.

Q. Were there subsequent conversations between yourself and George Finn and Charles Finn?

A. Yes, sir.

Q. In any of those conversations, was there a discussion relating to possible sale of the aircraft in suit? A. Yes, sir.

Q. What was said on that subject?

A. My statement may sound slightly confused, but we talked, or I talked to the Finns a number of times, and a number of times regarding the purchase by them and the sale by us of this aircraft,

(Testimony of Peter A. Bancroft.)

and I believe all the early discussions were to the effect that we were not interested in a sale [55] thereof.

Q. Who initiated the topic of possible sale of the aircraft in suit to the Finns—you or one of them? A. I believe one of them, sir.

Q. And when it was first proposed, what was your response to them?

A. That we were not interested in sale of the aircraft because we were using it as a classroom, and we needed it. Well, it had never occurred to us to sell it.

Mr. Abbott: Mr. Clerk, will you please place before the witness Vineland's Exhibit C, for identification, a document dated December 5, 1950.

(The document referred to was handed to the witness.)

Q. Do you recongize the document last described, Mr. Bancroft? A. Yes, sir.

Q. Did you receive it on or about December 5, 1950? A. Yes, sir.

Q. That document appears to be a bid for the aircraft in suit. Did you have any discussion with the defendants Finn about the time of receipt of that document?

A. Well, I am sure we did, sir.

Q. And what was said by either of them, and what was said by you at that time?

A. To the best of my recollection, this series of talks represented over a period of time a strong

(Testimony of Peter A. Bancroft.)

interest by [56] the Finns in purchasing this aircraft. We just as strongly said that we were not interested.

At the beginning, why, the offer of the Finns was limited, and as they became more interested and determined to reach an agreement with us on disposal of the aircraft, why, their offer became greater, and apparently at this time, about December 5th why, they felt that by submitting this offer that they would crystalize our thinking. We had never even at this time, as I recall, wished to dispose of the aircraft.

The Court: What time is this time?

The Witness: That is December 5, 1950, your Honor.

The Court: And this offer is Exhibit——

The Witness: Exhibit No. C.

Mr. Abbott: This is Vineland's Exhibit C, for identification, your Honor.

The Witness: I might add, Mr. Abbott, in addition to this, that even though this is an offer received from the Finns, that we had not advertised or shown any public interest in disposal at this time.

The Court: So far as you know, they were just tempting you, is that it?

The Witness: Yes, your Honor.

Q. (By Mr. Abbott): Now, prior to the time that you received this document you are now holding, Vineland's C, [57] for identification, had the matter of possible sale of the aircraft in

(Testimony of Peter A. Bancroft.)

suit to the Finns been raised at any meeting of the board of trustees of the Vineland Elementary School District?

A. I don't think there is any question that we had discussed it, yes, sir.

Q. Do you have with you today the minutes of the board of trustees of the Vineland Elementary School District? A. Yes, we have.

Mr. Abbott: May those minutes be marked for identification and placed before the witness? We request that they be marked Plaintiff's 9, for identification.

The Court: So marked.

(The document referred to was marked Plaintiff's Exhibit No. 9 for identification.) [58]

Mr. Nelson: Your Honor, at this time, if it would save any time of the court, we would be glad to stipulate that these are the minutes, and are genuine, and are as they purport to be.

The Court: Are they copies?

Mr. Nelson: Yes, they are a copy. They might even be the original copy. Are they?

The Witness: A part of them are originals, and others are copies.

The Court: Any objection to the receipt of them in evidence?

Mr. Nelson: No objection, your Honor.

Mr. Abbott: In that event, your Honor, at this

(Testimony of Peter A. Bancroft.)

time the Government will offer the entire record of the minutes in evidence, and if there is inconvenience to the School District resulting, it may be that at the close of the trial we can have the pertinent portions photostated and return them to the School District.

The Court: If the School District desires them, the Government can have them photostated and substitute the photostats for the originals. Exhibit 9 is received in evidence.

(The document referred to, and marked Plaintiff's Exhibit 9, was received in evidence.)

Mr. Abbott: We will be happy to supply them in that fashion. [59]

May Exhibit 9 be placed before the witness, please?

(The document was placed before the witness.)

Q. (By Mr. Abbott): As you are now viewing Exhibit 9, the minutes of the Vineland Elementary School District, Mr. Bancroft, are those minutes correct and complete?

A. To the best of my knowledge, sir.

Q. They are in fact kept by you, are they not, sir? A. They are kept by the District.

Q. Well, are you the particular person who prepares the minutes?

A. At the time of 1950, yes, sir.

(Testimony of Peter A. Bancroft.)

Q. What period is embraced by the minutes which are before you, Plaintiff's 9?

A. July, 1942, through December, 1951.

Q. Being more specific, Mr. Bancroft, is there any action, official action of the board of trustees of the Vineland Elementary School District, relative to the aircraft in suit which is not reported in the minutes before you, Plaintiff's 9?

A. There is no official action that I know of, sir.

Q. You understand what I mean by official action. A resolution of the board of trustees at a formal meeting of that date.

A. Yes, sir; to my knowledge, all resolutions are in the minutes. [60]

Q. And, in particular, are resolutions relating to the aircraft in suit?

A. That would cover the same group, yes, sir.

Q. Are all the transactions between the United States and the Vineland Elementary School District in June and July 1946, which you have previously described in your testimony, also included in those minutes?

A. I would like to make a statement there, if I may, Mr. Abbott, that at the time these minutes were kept in 1942, I was the secretary to the School District, in addition to being district superintendent, and in addition to a number of duties, such as buying groceries for the cafeteria, I wrote the minutes, and kept the payroll, and many other things, and obviously in a district of six to seven hundred children that is a pretty good-sized job,

(Testimony of Peter A. Bancroft.)

and so the minutes were kept, and to my knowledge we passed very few resolutions, as such. We had board minutes of action, but we didn't have discussion, and they are not in too much detail at the time. So as you refer to resolutions pertaining to agreements with the Government, we probably discussed them at a regular board meeting, but I don't recall any minutes of resolutions as such.

Q. Well, is there any proceeding of the board of trustees of the Vineland Elementary School District relative to the transaction between the United States and Vineland in June and July of 1946 which is not recorded in Plaintiff's [61] 9, the minutes before you?

A. I don't recall any resolution, formal resolution. We did discuss the agreement, and permission was granted to proceed with the agreement with the Government, but so far as a written resolution, I don't recall any.

Q. Whatever was done was recorded in the minutes; is that correct, Mr. Bancroft?

A. Not necessarily.

Q. What action did the board take in June and July of 1946, relative to the transaction between Vineland and the Government previously described, which is not recorded in those minutes?

A. Mr. Abbott, we are becoming specific again, as to months, and so with that in mind, I don't recall exactly what happened during those months. We had a number of discussions at regular board meetings, but whether it was formal and recorded

(Testimony of Peter A. Bancroft.)

in the minutes in every detail of those meetings, that I cannot say.

Q. Do you have any present recollection of any action by the board of trustees in connection with the transaction between Vineland and the United States, in the year 1946, which action by the board is not recorded in those minutes? [62]

A. We discussed the proposal to obtain property from the Government, and, as I recall, we did that at a regular board meeting, and approval was given to go ahead and obtain property, and at the same time, as I recall, approval was given to establish the aviation program in the district. I don't recall seeing in the minutes the formal notation of any resolution to that effect.

Q. Does the absence of a notation of resolution indicate that there was no resolution?

A. That is possible.

The Court: What do you mean by "resolution"? Someone says, "I move," and someone else says, "Seconded," and it is carried? Is that a resolution?

Mr. Abbott: That is my understanding, your Honor.

The Court: Is that your understanding of resolution?

The Witness: No, sir. We have—well——

The Court: I apprehended you were misunderstanding each other. That is the reason I am interrupting you. What difference does it make if it was moved, and seconded, and carried? That is sufficient, is it not?

(Testimony of Peter A. Bancroft.)

Mr. Abbott: I don't attach any technical significance to the word "resolution," simply a motion adopted by the board.

The Court: Is there anything in issue here about what the school district did in getting the aircraft? [63]

Mr. Abbott: Yes, your Honor. The Vineland Elementary School District, through its counsel, in the brief and in the opening statement has thrown open the whole question as to whether the school district has taken any official action relative to this aircraft, either as to disposition——

The Court: Why don't you ask him a leading question, then, and not what is shown in the minutes? If the trustees took the action, that is sufficient.

Mr. Abbott: That is what I was trying to get at, your Honor, and I frankly don't know whether they did or not.

The Court: What is the inquiry? Did you go after the plane from the Government?

The Witness: Yes, we did.

The Court: Did the board pass upon it?

The Witness: They agreed, yes, sir.

The Court: Adopted the aviation program for the school district?

The Witness: Yes, sir.

The Court: And by board action authorized the acquisition of the plane from the Government?

The Witness: Yes, your Honor.

(Testimony of Peter A. Bancroft.)

Q. (By Mr. Abbott): Was the Form 65 agreement, Plaintiff's Exhibit 1, for identification, discussed at a board meeting?

A. Mr. Abbott, I am not certain at this time whether [64] the actual form was discussed, but we did discuss purchase of the aircraft in suit.

Q. Well, what is your best recollection as to whether or not there was any discussion of the Form 65, Plaintiff's 1?

The Court: Let's go at it this way: Did you acquire the plane from the Government? Did you act for the district?

The Witness: Yes, your Honor.

The Court: Were you authorized to do whatever was necessary to get it?

The Witness: Yes, sir.

The Court: Did the board by motion adopted authorize you to do whatever was necessary to get it?

The Witness: I am not positive by motion, but with agreement by the board. You see, some of these topics may be vague here before the court, but I can say at this time we didn't have the minutes in detail as complete as they should be. Many items were discussed, and if we were in agreement, that was it. Sometimes, such as having work done on something of a specific nature, there would be an entry as such, but every discussion of the board or every agreement was not always entered.

The Court: The presumption as to regularity of official action, I assume, is that it was all regular.

(Testimony of Peter A. Bancroft.)

Mr. Abbott: I will move on, your Honor.

Q. (By Mr. Abbott): Was there any action taken by the [65] board after receipt of Vineland's Exhibit C, the document dated December 5, 1950, which appears to be a bid from the Finns to the school district?

A. I know that the bid was read, sir and rejected, and discussion attended the bid. Now, whether it is entered in the minutes, that I don't know.

The Court: If it is, it will appear in Exhibit 9, will it not?

The Witness: Yes, your Honor.

Mr. Abbott: Mr. Clerk, will you please place before the witness defendants Finn Exhibit L, for identification.

Mr. Charles Finn: Your Honor, this poses the question of the use of our exhibits.

The Court: They are here for any use that can be made of them. They are in the custody of the court when they are marked.

Mr. Charles Finn: Thank you very much.

Q. (By Mr. Abbott): Do you recognize the document last described, Mr. Bancroft?

A. I need it just a minute here to examine.

Q. Certainly.

A. Yes, sir. I think I recognize it.

Q. Did you receive that document from the defendants Finn, with signatures apparently endorsed on there on or about the date it bears, January 19, 1950? [66]

A. I believe that to be the case, Mr. Abbott.

(Testimony of Peter A. Bancroft.)

There are no signatures on this one, but I think we did receive one that followed the one of December 5, 1950.

Q. And was there a discussion with the defendants Finn relative to possible sale of the aircraft at the time that you received the document you are now viewing, the Finns' L?

A. I am not certain if there was a discussion at the time, but certainly there was between the two documents, because there is obvious evidence here of an increase in their bid, and that was brought about by discussion, since we were dissatisfied with the one of December 5, 1950.

The Court: What was the bid of December 5, 1950? What did it amount to?

The Witness: Well, there is a letter, your Honor, explaining the use here.

The Court: Isn't there some money figure mentioned?

The Witness: $3000 in cash was one item, your Honor.

The Court: Was that amount increased later?

The Witness: Yes, your Honor, to $5000.

The Court: When was that increase?

The Witness: January 19, 1951.

Q. (By Mr. Abbott): There is a reference in the document now before you, the Finns' L, to release of restrictions imposed by the Government of the United States. Had there been any discussion on that topic between December 5, [67] 1950, and January 19, 1951?

(Testimony of Peter A. Bancroft.)

A. I don't recall anything definite. I assume there were, because if they are mentioned here, that must have been a worry of ours at that time, as it became later.

Q. Do you recall anything else of the discussions between yourself and the Finns during the period I described in my last question?

The Court: Mr. Abbott, I suggest you refer to the defendants as the defendants Finn. Their name is not Finns, as I understand. It is Finn. Is that correct?

Mr. Abbott: I will do so, your Honor.

The Witness: Well, between these two dates, and the two bids, we had a number of discussions, some of them rather lengthy. In fact, I think some of them ran to 2:00 and 3:00 o'clock in the morning, and they were made generally and individually, wherever the boys found us, at school, or found me, and we still were not, as I recall at this time, interested in disposal of this aircraft, and so their bid or bids or interest in the plane increased in amount until the final contract and agreement.

Q. Now, did you have a discussion with them shortly after receiving the so-called bid dated January 19, 1951? A. Yes, sir, we did.

Q. Were only the defendants Finn present with yourself at that time, or were there other people there? [68]

A. I don't recall whether—at the time whether it was with the defendants Finn only, because there were times when they met with the board also.

(Testimony of Peter A. Bancroft.)

Q. Now, are you in your last statement, that there were times when they met with the board, referring to a time after January 19, 1951?

A. That I can't recall.

Q. Well, will you recall as best you can what the conversations were after receipt of the bid dated January 19, 1951, the defendants Finn L.

A. As I recall, this still was not a satisfactory bid. I think we felt that the plane was worth more to the district than had been offered, although obviously the offer was interesting, and our main purpose was that we used this as a classroom, and we didn't wish to get rid of it as a classroom use, so that always made any approach by us to their offers somewhat hesitant, and there is no doubt in my mind that as this was rejected by the board, that we did consult the Finns, and, of course, I think they wanted to know why, and we told them that it was still insufficient to our interests.

Mr. Abbott: Mr. Clerk, will you place before the witness Defendant Vineland's Exhibit A, for identification, a document entitled, "Notice for Bids," dated January 6, 1951.

The Clerk: That must already be over there. [69]

The Court: It was attached to the defendant's answer. I don't know whether it is here otherwise or not. Do you have an extra copy of it?

Mr. Nelson: It is attached to the defendant's answer.

The Court: Do you have an extra copy?

Mr. Nelson: We have, I believe. We have an

(Testimony of Peter A. Bancroft.)

extra copy of the answer, and attached thereto is a copy of the notice.

The Court: Do you wish to withdraw the exhibit from the answer and have it marked here separately?

Mr. Nelson: If the court please, we would be glad to give this copy, and have it marked.

The Court: Without the answer?

Mr. Nelson: Yes.

The Court: Detach it from the answer, and let it be marked.

The Clerk: All right.

The Court: As defendant, Vineland School District's Exhibit A, for identification.

(The document referred to was marked, Vineland's Exhibit A for identification.)

The Court: Place Exhibit A, for identification, before the witness, Mr. Clerk.

(The document was placed before the witness.) [70]

The Court: Have you had an opportunity to examine it?

The Witness: Not in detail enough, your Honor.

The Court: Proceed, and take your time. Let us know when you are finished.

The Witness: The question, Mr. Abbott?

Q. (By Mr. Abbott): Did you prepare that document, Mr. Bancroft?

(Testimony of Peter A. Bancroft.)

A. The Notice for Bids?

A. I don't believe I did.

Q. Yes.

Q. Did you assist in its preparation?

A. Indirectly, yes, sir.

Q. Who did prepare it, if you know?

A. I am not certain as to that, either. I believe the county counsel did. But I am not positive to that, either.

Q. Mr. Nelson?

A. That's the Notice for Bids?

The Court: Mr. Nelson's office?

The Witness: I believe so, yes, sir.

Q. (By Mr. Abbott): Now, did you supply to Mr. Nelson's office the information necessary to the preparation of the Notice for Bids?

A. Yes, sir.

Q. Calling your attention in particular to the second paragraph. [71]

> "Bidders are expressly notified that the aforesaid aircraft was acquired by the district from the Government of the United States and the War Assets Administration, subject to certain restrictions on the use thereof under the deed of conveyance, and the successful bidder will be required to secure the necessary release to said restrictions from the property governmental agencies of the Government of the United States of America."

(Testimony of Peter A. Bancroft.)

Was that language I just read based upon a conversation you had with the draftsman in instructing him how to prepare it?

A. Frankly, I don't know where that particular wording came into the agreement.

Q. Well, was that general topic discussed by you with the county counsel? A. Yes, sir.

Q. Was it discussed by you with the defendants Finn? A. I am sure it was.

Q. Now, calling your attention in particular to the date of the Notice for Bids, which is January 6, 1951, does that refresh your recollection or cause you in any way to add to or change your testimony relative to the board reaction to the bid dated January 19, 1951? A. Yes, sir, it does. [72]

Q. And what is your present recollection as to the action of yourself and the board after receipt of that bid of January 19, 1951?

The Court: Exhibit?

Q. (By Mr. Abbott): Exhibit L of the Finns for identification.

A. Evidently the bid, Exhibit L, dated January 19th, was submitted after the notice of posting, and so I think, as I made reference to the unsatisfactory status of this bid, that I figured it was prior to the posting of notice, which was January 6th.

The Court: By "this bid," you refer to Defendants Finn Exhibit L for identification?

The Witness: Yes, your Honor.

Q. (By Mr. Abbott): Then was there action

(Testimony of Peter A. Bancroft.)

taken with respect to the defendants Finn Exhibit L by the board in a formal meeting?

A. I haven't gone through all these minutes, obviously, Mr. Abbott. We have them indexed here for the convenience of the court. Is it necessary to do all this right now, because if——

Q. The minutes will speak for themselves. The question was narrative, to present the question to the jury. And I can read a short excerpt in order to present it in chronological fashion on that [73] date.

The Court: Reading from Exhibit 9, now?

Mr. Abbott: I am, your Honor. I am reading an excerpt from Exhibit 9, minutes of a meeting of the Board of Trustees of the Vineland Elementary School District dated January 22, 1951.

> "Members present, Walter Johnson, Ray Mitchell, Philip Lundquist. Mr. Bancroft opened bid from Charles C. Finn and George C. Finn. Mr. Mitchell made a motion, seconded by Mr. Lundquist, motion carried, that the board accept this bid as submitted by George C. Finn and Charles C. Finn, subject to the approval of the bid itself by the county counsel, and subject to the contract arrangements as approved by both parties and the county counsel."

Mr. Nelson: Your Honor, if it will save the court's time, again, we will point out the acceptance of the bid has been stipulated to by the parties here.

(Testimony of Peter A. Bancroft.)

The Court: Offer another stipulation for the benefit of the jury.

Mr. Nelson: We will so stipulate that the board of trustees did accept the Finns' bid on the date indicated in the minutes.

Mr. Abbott: And on the particular language quoted.

Mr. Nelson: Yes. I would also like to point out to the court at the present time this was not Mr. Nelson's office, [74] and inasmuch as I would like to claim the county counsel's office as my own, I am an assistant county counsel there, and I was not a member of the office at the time any of these transactions took place.

The Court: Very well. You concur in that?

The Witness: Yes, sir.

The Court: Mr. Bancroft will adopt that last statement as part of his testimony, I take it.

Q. (By Mr. Abbott): Were your dealings in connection with this matter with Mr. Gargano, the county counsel, Mr. Bancroft? A. Yes.

Q. Now, in the excerpt from the minutes dated January 22, 1951, which I have just completed reading, there is a reference to the approval of the bid itself by the county counsel and approval by both parties of the contract arrangements and approval thereof by the county counsel. Do you know whether or not the county counsel, in fact, approved——

Mr. Blackman: Just a moment. I believe that would be hearsay as far as this witness is concerned.

(Testimony of Peter A. Bancroft.)

The Court: Is there any question about it?

Mr. Nelson: I would object on the ground of privilege. What occurred between the District and its counsel in this matter would be for them alone to——

The Court: Is there any issue as to that?

Mr. Blackman: We have no issue. [75]

Mr. Nelson: I see no issue, no, sir.

The Court: May it be stipulated county counsel did or did not approve, whichever the case is?

Mr. Abbott: We offer the stipulation that he did approve.

The Court: For the purpose of this trial may it be stipulated he did approve?

Mr. Blackman: We will so stipulate.

Mr. Nelson: I would stipulate your Honor, to one extent, and that is he did approve as to the agreement that was drawn up. Now, in our office we don't, oftentimes, see the specifications that the District may have out at its office. We merely drew up the agreements and we draw them the way the District, ordinarily the way the District wants to.

The Court: Is the agreement here?

Mr. Nelson: And I will certainly stipulate——

The Court: What exhibit is it? Exhibit B?

Mr. Nelson: Yes, your Honor. We will stipulate that the county counsel did draw this agreement up.

The Court: Do you have an extra copy of that?

(Testimony of Peter A. Bancroft.)

Mr. Nelson: Yes, I do, your Honor.

The Court: As I understand it, Mr. Bancroft, the county counsel did approve of the arrangement insofar as the arangement is embodied in the agreement, Exhibit B for [76] identification; is that correct?

The Witness: Yes, your Honor.

Mr. Abbott: The approval of the Board of Trustees, according to the minutes is also conditioned upon the approval of the bid by the county counsel. Therefore, I would——

The Court: The bid is part of the arrangement, isn't it?

Mr. Nelson: May I make this suggestion, your Honor? The county counsel's office may or may not approve particular transactions. As counsel for the School District, it is our duty to tell them the law when it is presented to us, and when we are asked; and as far as——

The Court: And I asked the witness if it were true that the county counsel approved the transaction insofar as it is embodied in Exhibit B for identification. That would be correct, wouldn't it?

Mr. Nelson: I would say that was correct, your Honor, with the exception of the specifications, which are not before us.

The Court: As far as the legal aspects are concerned, they were approved?

Mr. Nelson: Yes.

The Court: He didn't approve the business arrangement, I suppose, or disapprove?

(Testimony of Peter A. Bancroft.)

Mr. Nelson: That is correct.

The Court: You don't contend that he did, Mr. Abbott? [77]

Mr. Abbott: No, your Honor. I would request the further stipulation that he approved the bid, which was——

The Court: You mean approved as to form?

Mr. Abbott: Approved within the meaning of the minutes, your Honor, which require his approval as a condition precedent to the approval of the board.

The Court: As far as you understand, did the county counsel approve the bid, Mr. Bancroft?

The Witness: There is that word "approve." He concurred with us on it, yes.

The Court: According to your understanding, he approved the bid, did he?

The Witness: Yes, sir.

Mr. Abbott: I don't care to labor the point, your Honor, but the regularity of the proceeding is directly in issue as a result of counsel's opening statement.

The Court: But the presumption is that these transactions, like all transactions are fair and regular and the ordinary course of business was followed and that the law was obeyed. So you have the benefit of all three of those presumptions until there is some evidence to the contrary.

Mr. Abbott: Will the clerk please place before the witness Defendant Vineland's Exhibit B for identification?

(Testimony of Peter A. Bancroft.)

Q. (By Mr. Abbott): Have you reviewed the document last shown to you, Mr. Bancroft? [78]

A. Yes, sir.

Q. Do you recognize it? A. Yes, sir.

The Court: I take it you are referring to Exhibit B?

Mr. Abbott: I am, your Honor.

Q. (By Mr. Abbott): Is that a document prepared by the county counsel of Kern County?

A. Yes, sir.

Mr. Abbott: At this time, your Honor, the Government offers in evidence Plaintiff's Exhibits 1, 4, and 5; Vineland's Exhibits A, B and C; and the defendants Finn Exhibit L.

The Court: What about Exhibit D of Vineland? You are offering that?

Mr. Abbott: We do not offer that document, your Honor.

The Court: Is there any objection to the offer?

Mr. Nelson: No objection.

The Court: Plaintiff's Exhibit 1 for identification and 5 for identification are now received in evidence; as are Defendant Vineland's Exhibits A, B, C and D for identification; and Defendants Finn Exhibit L for identification, are now received in evidence.

Mr. Abbott: The Government's offer also includes Plaintiff's 4, your Honor, which I may have misheard the court, but I did not hear it on the court's order.

(Testimony of Peter A. Bancroft.)

The Court: Exhibit 4 is likewise received in evidence. [79]

(The documents referred to, and marked Plaintiff's Exhibits 1, 4, and 5, were received in evidence.)

(The documents referred to, and marked Vineland's Exhibits A, B, C, and D, and Finns' Exhibit L, were received in evidence.)

Mr. Abbott: Will the clerk please place before the witness Defendants Finn Exhibit X for identification?

Q. (By Mr. Abbott): Mr. Bancroft, you are now viewing a letter dated October 23, 1951, purportedly from yourself to the defendants Finn. Do you recognize that document? A. Yes, sir.

Q. Now, in it there is some reference to possession of the aircraft. Did you on or about that date deliver possession of the aircraft in suit to the defendants Finn?

Mr. Blackman: Just a moment. If the court please, we object to that as calling for a conclusion of law. I think the document speaks for itself. And there is another document which has already been introduced in evidence which indicates the possession was delivered on February 28, 1951.

The Court: Which is the other document to which you refer which you say is already introduced in evidence?

Mr. Blackman: The School's agreement dated February 28, 1951, Vineland's B.

(Testimony of Peter A. Bancroft.)

Mr. Abbott: That contains no record of any actual delivery at all. There is an undertaking to make delivery [80] there. I am referring to the physical act.

The Court: The objection is overruled. Do you understand the question, Mr. Bancroft?

I suggest you rephrase it, Mr. Abbott.

Mr. Abbott: I would be glad to, your Honor.

The Witness: I am not a lawyer, Mr. Abbott, and some of this is a little bit confusing.

Q. (By Mr. Abbott): Viewing now the document you have before you——

The Court: Exhibit X.

Mr. Abbott: Exhibit X.

The Court: If you say, "Viewing now Exhibit X before you," we would save some time there.

Q. (By Mr. Abbott): Can you state whether you delivered possession of the aircraft in suit to Charles Finn and George Finn on or about the date it bears, October 23, 1951?

Mr. Nelson: I must object to the word "possession." If he means physical possession rather than legal possession, I think he should so state.

Mr. Abbott: I will amend the question to include the "physical."

The Court: Actual physical possession.

Mr. Abbott: Actual physical possession.

The Witness: I am not certain as to the date.

The Court: Can you give us about when? [81]

It's been stipulated, hasn't it, at the pretrial hearing?

(Testimony of Peter A. Bancroft.)

Mr. Abbott: That is one point on which there was no stipulation, your Honor.

The Court: Give us the closest date you can, Mr. Bancroft.

The Witness: I am just not certain as to the date.

The Court: About when? Can you specify between one Christmas and the next? If you can, perhaps you can come toward the 4th of July and keep coming——

The Witness: I can't even remember what my wife's anniversary is.

Q. (By Mr. Abbott): Doesn't that letter refresh your recollection so you are able to say, Mr. Bancroft,—I am referring by "that letter" to Finns' X——

The Witness: This letter states that the district does release the plane, but it doesn't state when the plane actually took off from the school.

The Court: Can you give us within days before or after when it did?

The Witness: I am sorry——

The Court: Can you give us within months before or after?

The Witness: There were pictures taken, motion pictures of the plane taking off. It was green. We knew—we had a rain, because the plane delayed its take-off for a couple of days, so it was in the rainy season. [82]

Q. (By Mr. Abbott): Did you deliver actual

(Testimony of Peter A. Bancroft.)

physical possession on the date that the plane took off from the strip at Vineland?

A. What do you mean "physical possession"?

Q. Did you turn the aircraft over to the defendants Finn physically, Mr. Bancroft?

A. This letter, I would assume, would be physical turning—physically turning the plane over. It so states.

The Court: Is that your letter?

The Witness: Yes, sir.

The Court: Do you intend by that letter to give possession to the Finns?

The Witness: Physical possession.

The Court: Actual physical possession of the plane into the custody of the defendants Finn?

The Witness: Yes, your Honor.

Mr. Abbott: We offer in evidence Defendants Finn Exhibit X for identification.

The Court: Is there objection?

Received in evidence.

(The document referred to, and marked Defendants Finn Exhibit X, was received in evidence.)

Q. (By Mr. Abbott): Did you have any conversation with either of the defendants Finn on or about the time you delivered possession? [83]

A. Yes, sir.

Q. Can you recall that conversation now?

A. Yes, sir. It was mostly concerned with the technical details of take-off. As I say, the plane

(Testimony of Peter A. Bancroft.)

itself was ready for take-off during the rainy season, and the airport, or the strip of land, rather, in which the plane was to take off was too wet, and the sheriff's office, highway patrol and the fire department were all notified to be there—and I knew of those arrangements—as a safety factor.

Q. Referring, Mr. Bancroft, to Defendant Vineland's Exhibit B for identification, which is before you, and particularly to page 4, which reads in part, and I will quote from paragraph 4.

> "It is expressly agreed and understood that this agreement is contingent upon contractor's ability to secure the necessary clearances from the Government of the United States of America on restrictions now existing on use and possession of aforedescribed C-46 aircraft No. 2-3645, by virtue of the deed of conveyance of said aircraft from the said Government of the United States to the District, and by virtue of related Federal laws on the use thereof * * *"

and so on, relating certain undertakings, was there a discussion of that provision of the agreement with the Finns at [84] about the time that the aircraft was turned over to them physically?

A. I am certain there must have been.

Q. What was said on that occasion and on that topic?

A. I believe the Finns showed me a flight permit issued by C.A.A., Civil Aeronautics Authority, and I asked them at the time if this flight permit represented the release of restrictions which we

(Testimony of Peter A. Bancroft.)

wanted at the time and always had wanted under this contract and agreement, and they assured me that it was, that it would be impossible to get such a document unless it had the concurrence of the authorities in Washington. And I believe mention was also made at the time that War Assets Administration was one of those responsible parties.

Q. Did they tell you that the War Assets Administration had consented to release of the restrictions referred to in this Vineland's Exhibit B?

A. I am not certain whether War Assets was listed as one of the agencies, but it was my understanding that, according to them, that these restrictions had been removed and the permit issued by C.A.A., and that was evidence of that since that could be not done without it.

Q. Now, when you say it was your understanding, do you mean you were so told by the defendants Finn, Mr. Bancroft? A. Yes, sir. [85]

The Court: Any objection on the part of any member of the jury to carrying on for another hour today? If there is none, we will take a brief recess at this time. If any of you object for any personal reason, why, you may raise your hand.

Very well. Seeing no objection, you may be excused now for five minutes' recess, subject to the usual admonition.

You may step down, Mr. Bancroft.

(Short recess taken.) [86]

(Testimony of Peter A. Bancroft.)

The Court: Let the record show the jury are present. You may proceed, Mr. Abbott.

Q. (By Mr. Abbott): Mr. Bancroft, during the interval between February 28, 1951, the date of defendant Vineland's Exhibit B, now in evidence, and the time in October of 1951 when you delivered physical possession of the aircraft to the defendants Finn, where was that aircraft situated?

A. At the Sunset School.

Q. And was it on the school grounds through all of that time? A. Yes, sir.

Q. Was it being used as a classroom during that period? A. Yes, sir.

Mr. Abbott: At this time, your Honor, I would like to read a few excerpts from Plaintiff's Exhibit 1, now in evidence, as they bear upon the next topic for examination.

The Court: You may.

The Witness: Pardon me, Mr. Abbott. Could I make an additional statement to your last question?

Mr. Abbott: Whatever is necessary to make it entirely correct, of course, sir.

The Witness: Now, until the time the plane took off, obviously there was work done on it, and in the last few weeks when considerable work was being done on engines, and [87] that sort of thing, it was not being used as a classroom; but up to that time it was.

Q. (By Mr. Abbott): That would be a period of approximately four weeks; would that be correct?

(Testimony of Peter A. Bancroft.)

A. It is possible, yes, sir.

Q. Not more than six, in any event?

A. I would rather not say, because that ties down the length of time the work was done, and I am not sure just exactly when it started, but until such time as the work became an inconvenience to use by students, we continued to use it.

Mr. Abbott: I will now read, ladies and gentlemen, a few excerpts from the agreement dated June 25, 1946, Plaintiff's Exhibit 1, now in evidence, a document Mr. Bancroft has signed for the Vineland Elementary School District:

> "In consideration of the transfer of certain items of Aeronautical Property, under provisions of Surplus Property Act of 1944, Public Law 457, Vineland Elementary School District, located at Rt. 6, Box 207, Bakersfield, Calif., hereby certifies and agrees as follows:
>
> "1. That said institution is an 'educational institution' as defined in Paragraph 8304.1 of Surplus Property Administration Regulation No. 4 * * *."

And then there follows a quotation from the regulation [88] not immediately pertinent. Paragraph 2 is: "That the property to be acquired hereunder is for the sole use of"—and I am inserting that word because there are a series of blocks for answers, and the particular block checked reads "tax-supported institution for one of the following

(Testimony of Peter A. Bancroft.)

nonflight purposes," and the purpose checked is "Instruction."

Paragraph 6: "That the acquired property will not be used for any actual flight purposes.

> "7. That all acquired property when unfit for the above purpose will be sold only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content. Sales consummated within three years of the date of acquisition must have the prior approval of the Disposal Agency.
>
> "8. That this Agreement shall be effective for all future transfers of Aeronautical Property under the provisions of Surplus Property Administration Regulation No. 4, as amended from time to time."

I have read only a part of the document. The entire document will be before you for your inspection. [89]

Q. (By Mr. Abbott): Now, Mr. Bancroft, calling your attention to February 28, 1951, was the aircraft in suit on that day unfit for instructional use by a tax-supported institution?

A. No, sir. I feel that we could still use it as a classroom at that time.

Q. Then it was fit for instructional use by a tax-supported institution?

A. By any institution; school.

The Court: Construction, you mean?

(Testimony of Peter A. Bancroft.)

Mr. Abbott: I may not have been clear, your Honor. Instructional use.

Q. Is that the way you understood me, Mr. Bancroft? A. Instructional use, yes, sir.

Q. Thank you. Was there any time between February 28, 1951, and October 26, 1951, when the airplane in suit was unfit for instructional use by a tax-supported educational institution?

A. Probably during the time of readying the plane for flight, to which I previously referred.

Q. And was that activity of readying the plane for flight something done by the defendants Finn?

A. Yes, sir.

Q. And that occurred during the period of a few weeks prior to the date of delivery in October; is that correct? [90] A. Yes, sir.

Q. Was there any time during that period from February 28, 1951, to the date when the aircraft was flown away from Vineland, when the aircraft had been reduced to its basic material content?

A. Well, that "basic material content" is something which is quite controversial. I assume you mean had it been reduced to scrap?

Q. Well, let's answer that question then: Was it reduced to scrap during any of the period specified in my last question?

A. No, sir, it was not.

Q. Was it dismantled at any time in that period except in the process of repairing it or rebuilding it?

A. Yes, it was. The students used this airplane,

(Testimony of Peter A. Bancroft.)

used it not only as a classroom, but an actual operating airplane, as a tool in the class, and during that time, as previously, they would with hand tools, as a part of their instruction, remove parts from the airplane and reassemble them. So while it wasn't destroyed, or anything like that, it was used as partly dismantled and reassembled by the students in their classes.

Mr. Abbott: No further questions at this time, your Honor, by the Government.

Mr. Nelson: If the court please, we will reserve our [91] questions until we present our case.

The Court: Any further examination of Mr. Bancroft at this time?

(No response.)

The Court: You may step down.

By any of the parties?

(No response.)

The Court: You may step down.

Mr. Blackman: May the record show we would also like to reserve our examination until the presentation of our affirmative defense, your Honor.

The Court: Very well. I trust you gentlemen will not duplicate anything that has been covered.

Mr. Abbott: Mr. Krakrup, will you take the witness stand, please.

KAY KRAKRUP

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Kay Krakrup, K-r-a-k-r-u-p.

Direct Examination

By Mr. Abbott:

Q. What is your occupation, sir?

A. Airplane mechanic, and engine mechanic, and certificated—— [92]

The Court: We can't hear you. I can hardly hear you, Mr. Krakrup, and I don't know what the jurors way over there in the corner can hear.

The Witness: Well, I am an airplane mechanic and engine mechanic.

The Court: It is very important that you talk to them. Shout at them, if necessary.

The Witness: I am an airplane and engine mechanic, and designated C. A. inspector at Bakersfield Air Park.

Q. (By Mr. Abbott): How long have you followed that pursuit, sir? A. 30 years.

Q. Did you, during the period beginning February 28, 1951, and ending October 26, 1951, do work on a C46A aircraft bearing Air Force Serial Number 42-3645? A. Yes, I did.

Q. Did you do that work at the request of the defendants George C. Finn and Charles C. Finn?

A. I did.

(Testimony of Kay Krakrup.)

Q. Can you fix the period when you did the work any more precisely than was fixed in my preceeding question?

A. Yes, I have my work orders here.

Q. When was the work done by you, Mr. Krakrup?

A. I started September 14, '51, and finished in the month of October, October 26, '51. [93]

Q. Will you describe briefly the major items of work which you performed on the aircraft I have described to you?

A. Well, that is very hard to remember, eight years.

The Court: That is 1951?

The Witness: Yes. I mean three years probably.

The Court: When you finished was three years ago last Tuesday, was it?

The Witness: Yes.

The Court: October 26th?

The Witness: Yes.

Q. (By Mr. Abbott): Now, you have brought notes showing the charges you have made, have you not? A. Yes, sir.

Q. Refer to those if they refresh your recollection, and state to the jury, if you can, what work you did on the airplane.

A. Well, I assisted the Finn boys in making the plane fly, so that it could be moved out from Lamont, and in order to do that there was a lot of repairs and replacements to be done on the airplane.

(Testimony of Kay Krakrup.)

Q. I can't hear you. Will you please speak up a little for us?

A. We had to do a lot of replacements and repairs to the airplane.

Q. Go ahead. [94]

A. We had to do a lot of repairs and replacements of parts, like fuel pumps, carburetors, check valves, and, well, the hydraulic system. In other words, the whole fuel system was absolutely malfunctioning.

Q. Did you replace the fuel system, or just repair it?

A. Yes, all removable parts, and some of the lines. The airplane had been filled up with water, which had gone all the way up in the carburetors, and everything was stuck and locked solid and couldn't be moved.

Q. When you say everything was stuck, do you mean anything in the fuel system?

A. Yes, anything in the fuel system was completely inoperative; pumps and selector valves and all.

Q. Did you replace the pumps and selector valves, or did you merely repair them?

A. We replaced them all.

Q. Did you replace any other parts on the aircraft?

A. Wheels and ailerons; all wheels, the three wheels, the main wheels and tail wheel were replaced.

(Testimony of Kay Krakrup.)

The Court: The ailerons were recovered, is that it?

The Witness: Yes, they were recovered.

The Court: They were not replaced?

The Witness: No; recovered, put new fabric on them. [95]

Q. What other work, if any, did you do on the aircraft?

A. The biggest job was the removal of the remains in the fuel system after they had been filled up with water; lot of slush in the entire fuel system.

Q. Did you do any other work you have not described to the jury?

A. No, that is about everything; making ship flyable.

Q. Did you do all the work yourself, or did the defendants Finn do some of it?

A. No, the Finns had done a lot of it themselves before I came out there, and I helped them put the finishing touches on.

Q. Did you observe any other work had been done by the Finns? A. Yes, plenty.

Q. What work?

A. Well, like cleaning up the airplane, which was a very big item; and removing lot of excess weight from it.

Q. Will you explain what you mean by "excess weight"?

A. Well, like all the school equipment, benches and tables from the cabin, and plank floor and

(Testimony of Kay Krakrup.)

power units installed and radio equipment. We had to get it as light as possible in order to get it out of that small field.

Q. Did you observe they did any other work on the aircraft? [96]

A. No, that was about all there was done to the aircraft.

Q. Did you bill the Finns for the work that you did on the aircraft? A. Yes, I did.

Q. What is the amount of that billing?

A. $600 for the work done at Lamont.

Mr. Abbott: No further questions of this witness, your Honor.

The Court: Any cross-examination?

Mr. Blackman: Just a very few questions.

Cross-Examination

By Mr. Blackman:

Q. Mr. Krakrup, where was this work performed? A. At the school in Lamont.

Q. What was that?

A. At the school property in Lamont, Vineland School District.

Q. Was all of it done at the same place?

A. All of it up to the 26th of October.

Q. Was any of it done at the Bakersfield Municipal Airport, or Kern County Municipal Airport, if the name——

A. If there were, I had no connection with it.

Q. Was anyone else working on the airplane besides you and the Finns? [97]

(Testimony of Kay Krakrup.)

A. Not that I know of. If you are referring to the period in Lamont, I will say yes.

Q. I am sorry, sir.

A. During the period—if you were referring to in Lamont, there was lots of outside work done.

The Court: At the Vineland school?

The Witness: Yes. At that period, there was lots of outside work contracted out.

Q. (By Mr. Blackman): What was the nature of the work? Will you describe it, briefly, please?

A. Well, machine work, and so forth.

Q. What type of machine work?

A. Making up all different things and fittings; and instruments had to be sent out and checked and repaired.

Q. Instruments were pulled out of the airplane and sent out on repair? A. Some of them.

Q. Overhauled and returned to the airplane?

A. Yes. The instruments with malfunction had to be taken out.

Q. What was the condition of the hydraulic system when you started in doing this work? Was it working? A. No.

The Court: Is that material?

Mr. Blackman: Well, just in order to develop a little bit [98] more what kind of work——

The Court: What difference does it make? He had to do whatever it was necessary to get it to fly away from that school.

The Witness: Yes.

The Court: Whether much or little, doesn't matter, does it?

(Testimony of Kay Krakrup.)

If it is material, I don't want to limit you, but I don't see where it makes any difference whether they had to put any propellers and new tires and new doors, whatever they had to do they did it to get it away from that school, isn't that so?

The Witness: Yes.

The Court: There is no claim being made here for it, as far as I know.

Mr. Blackman: No, your Honor. The only thing was that it would give the jury an indication of the condition of the plane before they started in to do any work on it, and the condition——

The Court: Isn't it agreed that the plane wasn't operable at the time until after this work was done on it?

Mr. Blackman: Yes, your Honor. However, it could be non-flyable for just the lack of a single pump, as far as that goes, or non-flyable——

The Court: Well, while you and I are discussing it you [99] could probably bring it all out. I was attempting to shorten it. The fact he testified he worked from September 14th to October 26th, I take it that that would indicate itself something was done. That is over a month.

Mr. Blackman: Very well, your Honor. We will not proceed with that line of inquiry.

That is all.

The Court: Any further cross-examination?

You may step down.

Mr. Nelson: No questions.

(Witness excused.)

The Court: Next witness?

Mr. Abbott: Mr. Duly, take the stand, please.

DOUGLAS DULY

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Douglas Duly, D-u-l-y.

Direct Examination

By Mr. Abbott:

Q. What is your occupation, Mr. Duly?

A. Salesmanager, aircraft sales and service, Flying Tiger Line. [100]

Q. Have you had any technical education beyond the high school level?

A. Two years college.

Q Where?

A. Massachusetts Institute of Technology, Boston.

Q. Did you specialize in any particular field there? A. Yes. Aircraft.

Q. After leaving the Massachusetts Institute of Technology, what was your employment?

A. Pan American Airways—you want the whole—from date of graduation until today?

Q. You might indicate very briefly the nature of your employment, whether aircraft industry, chemical industry, and——

A. I have been in aircraft all my life, since graduation, 1932. I have been——

Q. And has your activity in the aircraft field

(Testimony of Douglas Duly.)

been primarily in the field of buying and selling aircraft? A. Yes, for the last 10 years.

Q. During that period of 10 years when you have been employed in the purchase and sale of aircraft, by what employers have you been so engaged?

A. The last eight years by the Flying Tiger Line, and prior to that, Lockheed Aircraft Corporation.

Q. Do your duties in the course of your employment for [101] the Flying Tiger Line, require you to follow market trends in aircraft?

A. Very much so.

Q. Has that been true for the entire period you have been employed by Flying Tigers?

A. Yes. I have been responsible for both the purchase and selling of our equipment, which includes about 62 airplanes. 31 of them are the C-46 airplane.

Q. And are you required in the course of that employment to buy and sell aircraft?

A. Yes, I am.

Q. Have you been familiar with the sales of C-46A aircraft during the period from 1946 to the present time? A. Yes, I have, sir.

Q. Approximately how many such sales are known to you?

A. That I have been involved in in that particular type airplane? 40.

Q. Will you describe some of the most recent sales, briefly stating, not the amount of money in-

(Testimony of Douglas Duly.)

volved, but the nature of the aircraft and the buyer and seller and any special conditions accompanying the sale, if such special conditions exist?

A. In this model airplane?

Q. Yes. Please confine your answers to the C-46 aircraft. [102]

A. 1947, our company had various inquiries from out of the country buyers for the particular C-46 airplane. We weren't using it at the time but Slick Airways was a concern in our proximity, and had this type of airplane on hand. Any inquiries we had on that airplane, I usually follow through with Slick Airways.

Some of these airplanes, C-46A, were available in 1947, '48, through War Assets for $5,000. They, in turn, were bought and resold to purchasers from South America for $8,500; in that area, '47, '48.

Q. Go ahead, sir, if you have not completed.

A. The airplane seemed to be dormant, price-wise, beyond that figure until the Korean War. In 1951, April, we were the successful bidder in purchasing an airplane from the United States Air Force for $31,000, and——

Q. Let me caution you, sir, to describe the sale and any special remarks you may have which bear upon the condition of the aircraft and the conditions of the sale; but not to, in the course of your direct examination, mention the sales price.

A. We haven't sold any C-46 airplanes in the last six months.

Q. Are you then, by reason of this continued

(Testimony of Douglas Duly.)

contact with the aircraft market, able to express an opinion as to the condition of the market at all times from July 25, 1946 [103] to the present date?

A. That is part of my business, yes.

Q. Now, have you ever seen Air Force Serial No. 42-3645, a C-46A aircraft?

A. Yes, I have.

Q. On what occasions have you seen it?

A. We purchased 18 C-46 from the Air Force in August 12, 1950. One of our mechanics advised me, in October, 1950, that there was a C-46 airplane in Bakersfield, and maybe our company would be interested in it for parts. And I saw that particular airplane you mention in about October, 1950.

Q. Was that the first time that you saw it?

A. I believe I flew over that area coming from Frisco one time a year before that and seen an airplane on the ground.

Q. On that occasion in October, 1950, did you inspect the aircraft inside and out?

A. Yes, I did.

Q. When did you next see the aircraft?

A. About the spring of '51.

Q. Where was it at that time?

A. Still at Arvin, Vineland School.

Q. Did you inspect the aircraft then inside and out?

A. Outside, not inside—outside, only.

Q. When did you next see the aircraft? [104]

A. In the immediate area of International Airports.

(Testimony of Douglas Duly.)

Q. Well, on what date was that, sir, approximately? A. It was in the fall of '51.

Q. Did you inspect the aircraft inside and out on that occasion?

A. As a matter of inspection, I went through it. I didn't see it for the purpose of inspection. I observed the airplane, and——

Q. When next after that date of inspection at International did you again see the aircraft?

A. Oh, I would have seen it possibly twice a month, three times a month during the total period it was there.

Q. Would that be roughly the period of October, 1951, to May of 1952? A. Yes, it would.

Q. Did you on any of those occasions inspect the aircraft on the inside? A. Yes, I did.

Q. How many times did you do so?

A. I would possibly be inside the airplane three or four times.

Q. Did you on every one of those occasions inspect it from the outside?

A. Observed it from the outside, yes.

Q. When did you next see the aircraft after the last [105] time you observed it at International Airports, Inc.?

A. I believe I seen it at the northeast end of the Lockheed Air Terminal one time, which was not on the property of International Aircraft.

Q. Do you recall the approximate date that you saw it then?

A. It would be April or May of '52.

(Testimony of Douglas Duly.)

Q. Did you inspect the inside of the aircraft on that occasion? A. No, I didn't.

Q. Did you observe the condition of the outside of the aircraft on that occasion?

A. Yes, I did.

Q. Have you seen it since that occasion?

A. Yes, I have.

Q. When, sir? A. October 22, 1954.

Q. Did you conduct an inspection of the aircraft on October 22, 1954? A. Yes, I did.

Q. Did you examine the interior of the aircraft on that date? A. Yes, I did.

Q. Did you examine the aircraft engines?

A. Yes. [106]

Q. Did you examine the instruments?

A. Yes.

Q. Did you examine the controls?

A. Yes.

Q. Did you examine the exterior surfaces?

A. Yes, I did.

Q. On each occasion when you made an examination did you examine each of the particular parts that I have referred to in my last questions, sir?

A. Yes, I did.

Q. Have you inspected the document entitled "Aircraft Appraisal Sheet," dated March 23, 1946, Plaintiff's Exhibit 2?

Mr. Clerk, will you place that exhibit before the witness, please?

The Witness: I have seen the document, yes.

(Testimony of Douglas Duly.)

Q. (By Mr. Abbott): And have you carefully analyzed the data which it contains?

A. Yes, I have.

Q. Have you also seen the document entitled "Aircraft Record Card," Plaintiff's Exhibit 6?

Mr. Abbott: I will ask the clerk to place that before you.

The Witness: Yes, I have, sir.

Q. (By Mr. Abbott): And have you studied the data which [107] it contains? A. Yes.

Q. Have you heard the testimony of Mr. Krakrup, the witness who preceded you on the stand today? A. I heard his testimony.

Q. Are you prepared to express opinions as to the market value and rental value of the aircraft described as C-46A, Serial No. 42-3645, that being an Air Force serial number, on dates from July 25, 1946, through February 1, 1953, as a result of the several acts you have described in your testimony?

A. The market value of the airplane during that period?

Q. On particular dates in that period, sir.

A. Value of the airplane could fluctuate. You name me the date, and I could give you the market value.

Q. What in your opinion was the fair market value of the aircraft described on July 25, 1946?

A. $5,000.

Q. What in your opinion was the fair market value of the aircraft described during the period

(Testimony of Douglas Duly.)

February 28, 1951, through October 26, 1951? And if it changed during that period, you might so state.

A. February, 1951, to October, '51?

Q. Yes, sir. Let me simplify the question for you: What in your opinion was the fair market value of the aircraft described on February 28, 1951? [108]

A. Why I am hesitating on that, the airplane, if I remember right, was disassembled. If it was in an assembled condition it had an approximate value of $20,000 to $25,000.

Q. On what date, sir?

A. In February of '51.

Q. When you refer to a "disassembly," are you referring to a disassembly by International Airports? A. International Airports, yes.

Q. It has been stipulated for purposes of this action that their possession was from October, 1951, through May of 1952. I want to again point out the date of my question, which is February 28, 1951.

The Court: You are asking him to assume the airplane to be in an assembled condition.

The Witness: Yes. I am a year ahead of time. No, in '51 that airplane would be at Vineland. I had seen it in the spring. It was in its whole condition.

Mr. Abbott: Yes. And on February 28, 1951, assuming it to be an assembled aircraft, what was its value in its then condition?

The Court: Fair market value for cash.

(Testimony of Douglas Duly.)

Mr. Abbott: Fair market value for cash.

The Court: Fair market value for cash.

The Witness: $25,000.

The Court: You understand all of these opinions you [109] are asked to express, unless otherwise stated, cover fair market value for cash.

The Witness: Yes, sir.

Q. (By Mr. Abbott): Has your testimony to date as to fair market value been based on the assumptions described by the court, Mr. Duly?

A. Yes.

Q. In testifying to date as to fair market value, you have been referring to the fair market value in a transaction for cash? A. Absolutely, yes.

Q. What in your opinion was the addition to fair market value, if anything, caused by the work on the aircraft described which was narrated in Mr. Krakrup's testimony?

A. The work done by Mr. Krakrup would enhance the value of it—laying as a dormant airplane, it would be less valuable than one that was put in flying condition. It would be—it has no value as a flying airplane until that work was done. Therefore, the value of February, '51, would be $25,000 as a flyable airplane; considerably less as a school classroom.

The Court: Did I understand you to say the fair market cash value on February 28, 1951, was $25,000? Now, according to my notes, this work was done seven months later, September, October of 1951. Were you assuming that the work was

(Testimony of Douglas Duly.)

done [110] prior to February 28, 1951, when you expressed that opinion?

The Witness: In February, '51, the airplane was dormant as a classroom article.

The Court: All right. Now, you are asked how much Mr. Krakrup's work on it, the work he described, and the work which was done prior to October 26, 1951, how much, if anything, did that add to the fair cash market value?

The Witness: Well, I would wish to be corrected. When an airplane is put in an airworthy flyable condition, that has greater value than an airplane that has been dormant for six years.

The Court: That is what you are saying? As I understand, at the end of February when it was dormant, it was worth $25,000.

The Witness: I wish to be corrected. Upon the completion of Mr. Krakrup's work it would be worth approximately $25,000.

The Court: At the end of February, 1951, February 28, 1951, before any of this work had been done, what in your opinion was the fair market value for cash of the assembled plane?

The Witness: Using information I have on hand from bidding that went on——

The Court: Assuming the condition of the plane as you knew it to be. [111]

The Witness: An airplane in similar condition——

The Court: You weren't asked that. You were

(Testimony of Douglas Duly.)

asked to give an opinion. You aren't asked to think out loud how you arrive at your opinion.

Do you have an opinion as to the fair market value for cash on the 28th day of February, 1951? Yes or no?

The Witness: Yes.

The Court: State the opinion.

The Witness: Between $20,000 and $25,000; less than $25,000.

The Court: How much less?

The Witness: $20,000.

The Court: $20,000. In other words, Mr. Krakrup's work added $5,000 to the value, is that your opinion?

The Witness: Yes.

The Court: What is your opinion of the fair market value for cash during the period from February 28, 1951, until the time that that work started on the plane? Did it change? $20,000 until the work was done?

The Witness: You are asking for a specific plane?

The Court: That's the plane we are talking about, the plane in suit. You understand that?

The Witness: Yes, I do.

The Court: Did the value of it change from the end of February until the work was done on it by Mr. Krakrup? [112]

The Witness: Assuming that the proper release of the airplane was available, that airplane en-

(Testimony of Douglas Duly.)

hances in value. February of 1951, I know of only one airplane available.

The Court: I didn't ask you that. You said at the end of February your opinion was $20,000. What was it in the middle of March? Still $20,000?

The Witness: Until that airplane is legally cleared for sale——

The Court: We are assuming it is legally cleared for sale. You can't sell it unless it is, can you?

The Witness: I believe at that time——

The Court: You are thinking about a great many other things. We are talking about an airplane of this type, which was available for sale on the market at that time.

The Witness: This type but not this airplane.

The Court: This particular airplane, yes, or if you want to put it around in another way, an airplane of this type in the same condition in which this was.

The Witness: That is better. $20,000.

The Court: All the way through?

The Witness: Yes.

The Court: Until the work was done prior to October 26th?

The Witness: Yes.

The Court: So that by the time we arrive at October 26, 1951, it was worth $25,000?

The Witness: It did go up, because it was in airworthy condition.

The Court: That would be $25,000?

The Witness: Yes, sir.

(Testimony of Douglas Duly.)

The Court: Does that cover it?

Mr. Abbott: That covers that portion of the testimony. Thank you, your Honor.

Q. (By Mr. Abbott): In answering all the questions I will put to you, please assume a marketable title, and no cloud upon title. Whatever the facts may be, make that assumption in expressing an opinion of market value for cash. In making that assumption, now, would you change any of your testimony as to fair market value at earlier dates, or was that assumption engaged in when you testified as to the earlier [114] dates?

A. There is a period where these airplanes could be obtained——

The Court: You weren't asked that. You are asked and you are giving your answers on this basis: Did you assume a marketable airplane? Was it a marketable type?

The Witness: A marketable type.

The Court: It would have to be, wouldn't it?

The Witness: Yes.

The Court: You can't assume the market value of something for sale which wasn't for sale, can you?

The Witness: There was a period there when the market in '51 on an airplane in this condition was, with no work done on it, would be $20,000. With work done on it, that is, a fair airplane, it would be $25,000.

Q. (By Mr. Abbott): In each case are you assuming that the title was clear and that there was

(Testimony of Douglas Duly.)

no cloud on the title which the seller would transfer? A. Yes.

The Court: Mr. Duly, as I understand your testimony, it is—assuming a plane of this type, in the condition in which you observed this plane to be as of July 25, 1946, in your opinion it then had a fair cash market value of $5,000; is that correct?

The Witness: In 1946? [115]

The Court: Yes.

The Witness: Yes, sir.

The Court: And you assumed, I take it, that the buyer would get a title when he bought it?

The Witness: Yes, your Honor.

The Court: And the seller would be able to deliver a title?

The Witness: In 1946?

The Court: At any time.

The Witness: Yes, your Honor.

Q. (By Mr. Abbott): Do you have an opinion, Mr. Duly, as to the fair rental value of the aircraft described when rented for cash during the period commencing February 28, 1951, and ending February 1, 1953?

A. Now, you are speaking about this particular airplane?

Q. Yes, sir, in the condition in which it was in fact during that period.

A. An airplane in the condition that this was in has no market—no lease value, no rental value until considerable work is done on it, which includes an interior; in general, reconditioning, modification,

(Testimony of Douglas Duly.)

to bring it to CAA specs, which detailed cost depends upon the interior, and could run as high as $50,000. Therefore, with this airplane unlicensed, there could be no rental. [116]

Q. Now, when you refer to certain work that would have to be done to make the aircraft suitable for the rental market, are you referring to the work necessary to CAA certification for passenger use within the continental United States, Mr. Duly?

A. I am.

Q. And what would be the approximate cost of that work on the aircraft on February 28, 1951, assuming the condition of the aircraft which in fact existed at that time?

A. February, 1951. One expenditure alone has been a standard flat rate price, in complying to CAA spec. 772, of $23,500. That does not have any interior in the airplane. The airplane would not be suitable for cargo, this particular C-46A airplane. Therefore, another expense, which we flat-rate in putting interiors in, which is seats, lavatories, hostess' buffet, additional windows, reconditioning the engines, which would amount to a total cost of around $45,000.

The Court: How many passengers would this plane take?

The Witness: It used to be 60, but now it is 50.

The Court: Fifty passengers?

The Witness: Fifty passengers.

The Court: Plus the crew?

The Witness: Plus the crew.

(Testimony of Douglas Duly.)

The Court: Plus a crew of three?

The Witness: Yes. [117]

Q. (By Mr. Abbott): Now, assuming the work you described was done, and that the plane had CAA certification or licensing to fly within the continental United States, what would its fair rental value be during the period commencing February 28, 1951, and ending February 1, 1953. And by rental value, I mean rental value for cash.

A. With the airplane completely ready to——

The Court: He is asking you to assume all that.

The Witness: Okay.

The Court: All you are asked to state is: Do you have an opinion, and if it is in the affirmative, the figure.

The Witness: The normal rent in the industry per month has been $5,000 a month in that period.

Q. (By Mr. Abbott): Would that be the fair rental value for cash of the particular aircraft described under the assumptions I outlined in my prior question? A. During that period?

Q. Yes, sir. A. $5,000 per month.

Q. What, in your opinion, was the fair market value for cash of the aircraft described on July 3, 1952, the date of commencement of this action?

A. In the condition of the airplane at that time?

Q. In the condition in which it in fact existed at that time, yes, sir. [118]

A. I will have to refer my mind to sales.

The Court: Mr. Duly, we don't want to hear the workings of your mind. You are an expert. All

(Testimony of Douglas Duly.)

you have to do is to state a figure. Don't tell us how you are thinking about it unless you are asked how you are thinking about it.

The Witness: Repeat that date again?

The Court: July 3, 1952.

The Witness: $30,000.

Mr. Abbott: I have no further questions of this witness at this time, your Honor.

The Court: You may cross-examine.

Cross-Examination

By Mr. Nelson:

Q. Mr. Duly, in your opinion as an expert, you saw the airplane at the Vineland School District in its hull condition, and you are also familiar, are you not, with the provisions of the restrictions that the Government had on school aircraft in 1946?

A. Yes.

The Court: Are you going to ask him if he assumes those restrictions were upon the sale?

Mr. Nelson: No, I realize in the items he has already testified to that he has not assumed those.

The Court: Now, do you wish him to assume those [119] restrictions are on that?

Mr. Nelson: I will, yes.

The Court: Then why don't you say to him: I ask you to assume that if such-and-such restrictions were against it, how would that affect your opinion as to value?

The Witness: In 1946?

Mr. Nelson: Yes.

(Testimony of Douglas Duly.)

The Witness: There were sufficient airplanes on the market for direct purchase from War Assets that school airplanes didn't enter the picture.

The Court: What you are asked to do and what Mr. Nelson wants you to do is—are you familiar with the restrictions upon the sale of those airplanes at that time?

The Witness: In 1946, no.

The Court: Then you will have to ask him to assume them, I guess.

Q. (By Mr. Nelson): Assuming, for the purposes of this question, that an aircraft is in a hull condition——

The Court: That is this aircraft, isn't it?

Mr. Nelson: Yes.

Q. (By Mr. Nelson): That this aircraft is in hull condition at a school district, and was purchased by the school, would there be any market value in 1946 for that aircraft?

A. Yes, all airplanes are saleable.

Q. What would be your opinion as to the approximate [120] value of that aircraft with the restrictions on, and in the hull condition?

A. $5,000.

The Court: With the restrictions against it?

The Witness: I will have to explain that. In 1946 the airplanes were in Ontario for public sale, and anyone could go out there and buy one.

The Court: You are asked now with respect to this particular plane. You saw this plane.

(Testimony of Douglas Duly.)

The Witness: Well, if there is a restriction, what kind of a restriction, sir?

Mr. Nelson: Whatever restrictions were in existence at the time.

The Court: The witness says he doesn't know them, so you will have to ask him to assume them.

Mr. Nelson: All right.

The Court: To assume this plane he saw up there in the school grounds in the condition it was in when he then observed it, and that any disposition of it was subject to certain restrictions.

Mr. Nelson: Yes, and I believe my question covered that.

Q. (By Mr. Nelson): In hull condition, with any restrictions on it at the same time, would that have the same market value?

The Court: The witness doesn't know, and I interrupt [121] to tell you the witness says he doesn't know what restrictions were on it.

The Witness: In 1946, no.

The Court: So you must ask him to assume what the restrictions were that were on it. I will see if I can help. What were the restrictions you want him to assume?

Mr. Nelson: I might read the restrictions. They are in an exhibit.

The Court: Counsel wants you to assume the plane was on the school ground, as you observed it, and any disposition or sale of it was subject to the following restrictions. Now, if you will read them.

(Testimony of Douglas Duly.)

Mr. Nelson: I will read the restrictions that are set up in one of our exhibits, Form 65.

The Court: He doesn't care where they come from. He is going to assume they are true, wherever they are in this case.

Mr. Nelson: For the purpose of this question I will assume they are true.

The Court: You are asking him to assume it, aren't you?

Mr. Nelson: That is right.

Q. (By Mr. Nelson): That the acquired property when unfit for the above purposes will be sold only as scrap and then only after it has been rendered completely unfit and useless except for its basic material content. Sales [122] consummated within three years of the date of acquisition must have the prior approval of the Disposal Agency, and, also, that the acquired property will not be used for any flight purposes.

With those restrictions on the aircraft, and the aircraft being in the hull condition at the Vineland School District, what would be your opinion of its fair market value?

Mr. Abbott: Your Honor, I object.

The Court: At what time?

Mr. Nelson: In 1946.

Mr. Abbott: I object.

The Court: As of July 25, 1946?

Mr. Nelson: Yes, your Honor.

Mr. Abbott: I object to the form of the ques-

(Testimony of Douglas Duly.)

tion, your Honor, because I don't understand, perhaps counsel does, what "hull condition" means.

The Court: Well, you mean the condition in which this witness observed it?

Mr. Nelson: He was using the term. The witness has used the term, "hull condition."

The Witness: You jumped from 1946 to 1949, I think.

The Court: At July 25, 1946.

The Witness: Reading those restrictions there, I am no mental process man, reading those restrictions there, it is [123] so much a pound.

The Court: Do you have an opinion as to what was the fair market value of the plane in the condition in which you observed it, subject to the restrictions stated, on July 25, 1946? If you have no opinion, you may say so.

The Witness: As I was not in the metal processing division, I have no opinion.

Q. (By Mr. Nelson): Do you also have no opinion as to its fair rental value at that time under the same assumptions?

A. In 1946 there was no such thing as rental value of airplanes.

Mr. Nelson: I have no further questions.

The Court: Any further cross-examination?

Mr. Blackman: I have, your Honor. Will your Honor permit me to go ahead now?

The Court: Yes, I want to finish with this witness.

(Testimony of Douglas Duly.)

Cross-Examination

By Mr. Blackman:

Q. Mr. Duly, you stated that this type airplane——

The Court: Don't review his testimony. We all remember what he said. Just ask him questions, Mr. Blackman.

Q. (By Mr. Blackman): That value of $5,000 that you said these airplanes had in 1947 and 1948, they were purchased from [124] War Assets?

A. Yes, sir.

Q. Were they in approximately the same condition as the airplane that you saw at the Sunset School in 1950?

The Court: The Sunset School is the Vineland School District?

Mr. Blackman: Yes, your Honor.

The Witness: Except for minor work to put the airplanes in the air, they would be in similar condition as a rule. [125]

Q. (By Mr. Blackman): Do you know of any that were purchased for any more or less than the $5,000 figure you have given us, at that particular time? A. No, sir.

Q. All that you know of that were purchased from War Assets went for about the $5,000 figure at that time?

A. They were on the market for 25,000 and there were no bidders, and War Assets reduced the

(Testimony of Douglas Duly.)

price to five, and several were bought and several were brought to Lockheed Air Terminal for $5,000.

Q. And the resale of them to these buyers in South America for $8,500 that you have told us about, was that after work had been done on them after they were purchased from War Assets?

A. No, that would be as is. There was very little work done on them.

Q. What was there, from the value you placed on them at that time to the value that you placed on them in 1951, that changed their value up to the $20,000 or $25,000 figure?

A. Supply and demand. This was a transport airplane, and the Korean war was in effect, and, naturally, airplanes were scarce, and the value went up. Although no work was done on the airplane, the actual value went up.

The Court: When, in your opinion, did the airplane in question here come to be worth more than $5,000, substantially [126] more than $5,000? At the outbreak of the Korean war?

The Witness: No, it took, I believe six months to generate interest in that type airplane.

The Court: That would be about the end of 1950, would it?

The Witness: Yes, your Honor.

Q. (By Mr. Blackman): Now, have you ever bought any school airplanes in the past 12 months?

A. No, I haven't.

Q. Have you ever bid on any?

A. No, I haven't.

(Testimony of Douglas Duly.)

Q. Did you ever bid on one at Lancaster?

A. No, I didn't.

Q. Have you ever known of any being offered for sale, school airplanes?

A. Oh, yes, I have. I am on the G.S.A. mailing list and I get all their notices to bid.

The Court: G.S.A. is what?

The Witness: General Service Administration.

Q. (By Mr. Blackman): And is that part of your business, to purchase them and build them up, and sell them and operate them?

A. A part of my business is to be informed where these airplanes are, and to be there at the time of bidding, and offer our service to recondition the airplanes; be there [127] where the bidding is opened at the time.

Q. What about the airplane in question here? Prior to the time that it was sold to the Finns, did you ever try to buy it?

A. We bought 18 airplanes on August 12, 1950, from the Air Force in Wright Field. I was the successful bidder for our company, and in October, as I have mentioned before, I went to—a mechanic told me that an airplane was lying there dormant, and I went there and contacted Mr.——

The Court: Went where?

The Witness: Went to Vineland and contacted Mr. Bancroft and gave him my card, asking him to advise me if the airplane was to be sold.

Q. (By Mr. Blackman): That was October, 1950?

(Testimony of Douglas Duly.)

A. Yes. It was approximately three months after we bought these 18 airplanes.

Q. And did you know that the Vineland School District owned it at that time? A. Yes.

Mr. Abbott: I will object, your Honor, as assuming a fact not in evidence.

Mr. Blackman: If it was reputed to be, that is what we are asking.

Mr. Abbott: He is asking what the witness knows.

The Court: Do you wish to modify your question? [128]

Mr. Blackman: Yes, sir.

The Court: Did you know the Vineland School District reputedly and allegedly owned the plane at that time?

The Witness: It was on their property. I assumed that.

The Court: How much did you pay for those airplanes you bought?

The Witness: From Wright Field?

The Court: Yes.

The Witness: The lowest one was $1,200, and they averaged out $28,000.

The Court: They averaged out $28,000?

The Witness: Yes.

The Court: Depending upon their condition?

The Witness: Yes.

The Court: That was free of any restrictions?

The Witness: Yes, directly from the Air Force.

(Testimony of Douglas Duly.)

By the way, they were of a later type, which we shouldn't possibly get into this.

The Court: The individual airplanes ranged in price——

The Witness: From twelve hundred.

The Court: From twelve hundred to what?

The Witness: A little over $28,000.

Q. (By Mr. Blackman): Those were all a different model, were they not, from the one in suit?

The Court: He just said they were later models. [129]

The Witness: Yes.

Q. (By Mr. Blackman): Later models. Mr. Duly, you say you spoke to the Finns after they told you they had acquired title to the plane?

A. The Finns came to my office and advised me they had an airplane; asked if our company would be willing to give them a bid on the repair.

Q. They asked your company for a bid for the repair of this particular airplane?

A. If we would be interested in it.

Q. When was that, sir?

A. The fall of '51.

Q. And did your company give them such a bid?

A. No, we didn't.

Q. Was there any particular reason why?

A. At that time I was getting inquiries from several other concerns to——

The Court: No. Did they tell you anything?

The Witness: Well, I am leading up to that.

(Testimony of Douglas Duly.)

The Court: You weren't asked to lead up to it. You are just asked if they told you.

The Witness: Will you repeat the question?

The Court: Please read the question.

(The question was read.)

The Court: Are you asking him for his reasons or their [130] reasons?

Mr. Blackman: Why he didn't give the Finns a bid in response to their request for a bid.

The Court: I am sorry. I misunderstood the question myself. He was correct.

The Witness: I didn't believe their bid was in earnest, because I had been getting calls from other concerns asking if I would—if our engineering department would furnish information on the licensing of this airplane. I didn't pursue the effort further. [131]

Q. Other concerns who asked you for a price on licensing the same airplane?

A. Slick Airways and our company are the only companies presently able to license this airplane, therefore, naturally, we were contacted—I shall tell you the firms, if you want. Southern California Aircraft Company in Ontario, contacted me. Grand Central Aircraft contacted me if I would supply engineering information to work on the so-called Finn airplane.

Q. Where was the airplane at that time, if you know?

(Testimony of Douglas Duly.)

A. Evidently it wasn't at Lockheed Air Terminal. I never seen it—wasn't on our airport.

Q. Did the Finns tell you they owned it?

A. Yes.

Q. Did they show you a registration certificate on it? A. No.

Q. In any event, your company didn't do any of the work on it, is that right? A. No.

Q. Is your company in the same general type of business as International Airports, Inc.?

A. Yes, it is.

Mr. Blackman: We have no further questions.

The Court: Any further cross-examination of Mr. Duly?

Any redirect? [132]

Mr. Abbott: I will be very brief, your Honor.

Redirect Examination

By Mr. Abbott:

Q. In response to certain questions from the court, Mr. Duly, you indicated some confusion or lack of knowledge on the question of restrictions on the aircraft in suit in the year 1946.

Now, are you presently aware of restrictions upon aircraft disposed of by delivery to schools pursuant to the Heddleston program shortly after World War II? A. Yes, I am.

Mr. Blackman: To which we object as being incompetent, irrelevant and immaterial.

The Court: Sustained. The answer will be stricken.

(Testimony of Douglas Duly.)

Q. (By Mr. Abbott): When did you first become aware, if you are aware, of any restrictions imposed upon the use or sale of aircraft delivered to school districts by the United States, Mr. Duly?

Mr. Blackman: Same objection.

The Court: Sustained.

Mr. Abbott: May I explain my purpose for this line of inquiry?

The Court: You may.

Mr. Abbott: Counsel has just gone into the matter with [133] the witness, apparently in an endeavor to lay the foundation for matters which he will bring out in the course of his case, and I believe the witness gave an answer which was somewhat ambiguous.

The Court: What answer did he give which you think was ambiguous?

Mr. Abbott: Something to the effect, these are not the exact words, he did not know of the restrictions in 1946.

The Court: He said he wasn't familiar, as I understood, with the restrictions which existed in 1946, is that correct?

The Witness: Yes, sir.

The Court: Now, whether he knows about them since, or whether there were any—he is asked as an expert witness to assume certain restrictions did exist, and he predicated his answer upon that assumption. What more is there? He is an expert.

Mr. Abbott: I wish merely to ascertain when, if and at what time he became aware of such——

(Testimony of Douglas Duly.)

The Court: There were some restrictions?

Mr. Abbott: That there were some restrictions, yes.

The Court: Very well. You may answer that. Without regard to what they were.

Mr. Abbott: Yes.

The Court: When did you first learn, if you did, there [134] were some restrictions upon the sale of aircraft or disposal of them, or use of them, aircraft such as the aircraft here in suit?

The Witness: In 1950 when I was at Wright Field.

The Court: Is that when you first learned?

The Witness: Yes.

The Court: You have answered the question.

Q. (By Mr. Abbott): Did the defendants Finn ask to borrow money upon the strength of the title which they claimed to have when they talked with you in 1950 or 1951? A. No, sir.

Q. Did they ask for credit at that time?

A. We didn't get that far along, no.

Q. Did any of the other companies in the industry with whom you had been in contact relative to licensing of the aircraft in suit indicate that the defendants Finn had asked for credit or asked to borrow money at that time? A. No.

Q. In the year 1950, was there a common reputation in the industry relative to the restrictions upon sale, use or possession of aircraft delivered to school districts by the United States, pursuant to the Surplus Property Act of 1944?

(Testimony of Douglas Duly.)

A. Yes, there was.

Q. What was that reputation? [135]

A. A clearance had to be obtained from a branch of the Government for clearance of that airplane before it could be sold.

Mr. Abbott: I have no further questions, your Honor.

Mr. Blackman: May I, your Honor?

The Court: Yes, you may. You may proceed.

Recross-Examination

By Mr. Blackman:

Q. Mr. Duly, you stated that in 1950 you first learned about these restrictions while you were back at Wright Field, is that right?

A. Yes, sir.

Q. All right. And by the way, what month in 1950 was that?

A. I submitted my bid August 12, 1950.

Q. Prior to the time you went back to Wright field in connection with this bid of yours in August, 1950, did you know about any restrictions on the use of school airplanes?

A. It was general—to this extent: the airplane had two values, so much to a school and so much to the individual, in 1946.

Q. I didn't ask you that, sir.

A. There was——

Q. Let me go over it again. You first learned about [136] restrictions on these type aircraft when

(Testimony of Douglas Duly.)

you went back to Wright Field in August, 1950, is that right, sir?

A. Officially. Unofficially, we knew there was some restrictions prior to that. Officially, I heard it from Wright Field. I didn't see any document. I have seen documents since then.

Q. Have you ever seen any document on it to this day? A. Yes, I have, sir.

Q. When was the first time?

A. I proceeded to Washington in August of 1950, and saw documents there.

Q. In 1950. What document did you see on this matter?

The Court: What matter?

The Witness: Restrictions.

Mr. Blackman: The restrictions.

The Witness: A type of form that was made out—I had not in my mind a clear idea of the airplanes sold one time, and then a restriction—I was interested in that restriction and I read it. It has been read in court here today.

Q. (By Mr. Blackman): As you read it, was it substantially the same as Mr. Nelson read it to you a little while ago?

A. I believe Mr. Abbott read it.

Q. Well, whoever it was, one of those other gentlemen, as they read it in court. [137]

A. Yes.

Q. And you say that is the first official notice that it——

(Testimony of Douglas Duly.)

A. First official notice that I read with my own eyes, yes.

Q. Now, prior to that time was there any common reputation in the industry that there were restrictions such as you have heard read to you in court today—— A. On school airplanes?

Q. ——on any airplane owned by a school district, or school?

A. It was common knowledge, sir.

Q. Do you know Mr. Batchelor, who is here in court? A. Yes, I know Mr. Batchelor.

Q. Over what period of time have you known him? A. Seven years, approximately.

Q. And during that time have you had many conversations with him? A. Yes.

Q. And your company is in competition to International Airports, Inc.? A. Very much so.

Q. This is a highly competitive industry, is it?

A. Yes, it is.

Q. And during this period of seven years and many [138] conversations, have you ever had, with Mr. Batchelor—let's limit this to before the date of this suit, which was July 3, 1952—in other words, during this period of five years ending July 3, 1952, have you ever discussed this matter of restrictions on school airplanes with Mr. Batchelor?

A. No, sir.

Mr. Abbott: We object to this. This is highly irrelevant and immaterial. We can hardly expect Mr. Batchelor would tell the world. It would inure to his——

(Testimony of Douglas Duly.)

The Court: You needn't argue the matter. His answer is in. It may stand.

Mr. Blackman: All right.

Q. (By Mr. Blackman): Did you ever discuss them with anybody at International Airports, Inc.?

A. No.

Q. But you say that you had been over to International Airports several times even after the Finn airplane came down to Burbank and was in International's possession, isn't that true?

A. I have been in their hangars, in and out, for five years, of that part there.

Q. And you were in the Finn airplane three or four times while you were down there?

A. Yes.

The Court: By the "Finn airplane," are you referring to [139] the airplane in suit?

Mr. Backman: Yes, your Honor. Yes, I will refer to it as the airplane in suit.

The Court: Otherwise, you are getting this problem of assuming facts not in evidence.

Mr. Blackman: All right, your Honor. I am glad that you raised the question.

Q. (By Mr. Blackman): Did you speak to anyone at International Airports, Inc., regarding a question of restriction on the use of the airplane during the period you were down there through the airplane? A. No, I didn't.

Q. And yet you say at that particular time you knew that there had been restrictions on school airplanes?

(Testimony of Douglas Duly.)

A. I assumed that they had the proper title or the airplane wouldn't be there. I didn't go into it further.

Q. What made you make that assumption, Mr. Duly?

A. The airplane—I seen it in Bakersfield and after that it was in Burbank. Evidently some possession had been constituted, or the airplane wouldn't have——

Q. That fact, to your mind, being an expert in this field, led you to believe that they had proper title, is that right?

A. Not from reading that document—I don't know what went on in the transaction. Not from reading the document [140] in Washington did I know what transpired. I didn't ask.

Q. My question was simply this, what made you assume they had proper title when you saw it at Vineland at one time and then saw it at Burbank on the next occasion?

A. I never assumed they had proper title.

Q. Isn't that what you stated just a few moments ago? A. No.

Q. What did you assume when you saw it at Burbank and went through it several times?

A. That the Finn boys had contacted our shop to do the work and come back and got it, and that was it.

Q. What did you assume with respect to title on the airplane when you saw it at Burbank and went through it?

(Testimony of Douglas Duly.)

A. Would probably check that if it came to my shop; and it wasn't in my shop.

The Court: Did you make any assumption with respect to that? If you did, what assumption did you make?

The Witness: I made no assumptions.

Q. (By Mr. Blackman): Made no assumptions at all. Did you ever, knowing what you state that you knew at that time regarding title, did you ever consider that it was worth passing a comment to Mr. Batchelor here regarding these restrictions, asking him whether the restrictions had been lifted?

A. I had no knowledge of the restrictions being lifted. [141] I did not delve into another man's business in that respect.

Q. You were on very friendly terms with Mr. Batchelor during that time?

A. What do you mean by "friendly terms"?

Q. Well, were you on friendly terms?

A. I am a competitor of his.

Q. Does that mean you were on unfriendly terms?

A. Many, many times; I mean competitivewise, yes.

Q. Mr. Duly, I want to ask you two questions along this matter of common reputation which you have stated. What does that mean to you? What is "common reputation"? You hear it from everybody that you speak to in the industry?

A. Common reputation of an individual?

Q. No; with respect to restrictions. I want to

(Testimony of Douglas Duly.)

know whether you assume the same thing as possibly Mr. Abbott assumed. Did you hear this matter of restrictions on school airplanes from every individual you spoke to in this industry?

A. It was general knowledge that there must be clearance given to a school airplane.

Q. Well, you have used that word "general" knowledge, and that doesn't help me any more than "common reputation."

To your own recollection, with respect to this period in 1950 and 1951, did you have conversations with other people in the aircraft industry wherein the subject of restrictions in the use of school aircraft, let's call them [142] school aircraft, was discussed between you?

A. In our own organization, yes.

Q. In your own organization, meaning in the Flying Tiger Line? A. Yes.

Q. All right. By that answer I will assume that you didn't with respect to any other organizations.

A. Slick Airways, another competitor. Their man has a similar job as mine, and we could have discussed this, yes.

Q. Slick Airways, either now or within the last six months, at one time was merged with the Tiger Line?

A. No. Attempts were made, but never was official.

Q. All right. Anybody else? A. No.

Q. So that your conception of common reputation lies from what you discussed in your own or-

(Testimony of Douglas Duly.)

ganization and what you discussed with possibly one or a few men at Slick Airways, is that right? You can answer that yes or no.

A. That I went around knocking on doors asking if—it was common knowledge. Who would say it, whether a pilot or mechanic, that there was a restriction on school airplanes,—that was common knowledge. I don't go around asking people that. I am repeating, it is common knowledge. Who originated it on the West Coast, I can't determine it.

Q. Mr. Duly, you didn't discuss the matter with anyone [143] else outside of your own organization, excepting Slick Airways, is that right?

A. We being the largest users of the airplanes, naturally—that was, we had knowledge of that fact. But as far as discussing it with other people, it wasn't necessary; it wasn't part of our business.

Q. And you didn't do it? A. No.

Mr. Blackman: That is all.

Mr. Nelson: Two questions, your Honor.

Q. (By Mr. Nelson): Mr. Duly, you indicated in 1950 that you did go back to Washington and review documents concerning these restrictions on schools. Have you determined at this time whether or not a school district can sell an aircraft after a three-year period? [144]

Mr. Abbott: Objection, your Honor. That calls for a conclusion of law, not within the province of the witness.

The Court: Sustained.

(Testimony of Douglas Duly.)

Q. (By Mr. Nelson): Mr. Duly, at the present time do you know how to obtain an aircraft from a school district and obtain clear title to it?

Mr. Abbott: The same objection, your Honor.

Mr. Nelson: This man is an expert.

The Court: It is immaterial.

Mr. Abbott: And it is not only a conclusion of law, it is irrelevant and immaterial.

The Court: If you want to ask him about where he goes, and who he sees, and some facts, that is one thing, but to ask him a question of law, he might be able to decide the case for me on that basis.

Mr. Nelson: This gentleman is probably the only one who has gone to Washington and made some sort of a determination. I understand that he has purchased school aircraft. Is that true?

The Witness: No, I have not.

Mr. Nelson: Then that answers my question.

The Court: All right. Anything further from Mr. Duly?

Mr. Abbott: No, your Honor.

The Court: Step down. We will take the recess until tomorrow morning. [145]

Mr. Blackman: Your Honor, one more question from the witness on the basis of the information given.

The Court: Very well.

(Testimony of Douglas Duly.)

Recross-Examination

By Mr. Blackman:

Q. Mr. Duly, we spoke about whether or not you bid on any school airplanes. You said that you did not, is that right? A. That's right.

Q. Did you attend a sale at Lancaster of a school airplane? A. Not at Lancaster; at Muroc.

Q. At Muroc? A. Yes.

Q. You did attend such a sale? A. Yes.

Q. When was that, sir?

A. January of this year, I believe.

Q. Pardon? A. January of 1954.

Q. Just this last January? A. Yes.

Q. And what was your purpose in attending the sale?

A. As I have attended many sales, to be on hand when [146] that airplane would be awarded to a party, to offer my services to recondition it.

Q. Didn't you bid on that airplane in the name of someone else? A. No, sir.

Q. Do you know a Mr. Lee Cameron?

A. Yes, I know Mr. Lee Cameron.

Q. Did you have anything to do with Mr. Lee Cameron, in connection with that Lancaster sale, or that Muroc sale?

A. No, in the extent that I was there, and I don't know whether he was there or not. I was there in April when the airplane was offered again, and Mr. Batchelor was there.

(Testimony of Douglas Duly.)

Q. And you had absolutely no interest either for yourself or for anybody else as to who got that airplane that was sold at Muroc?

A. No, sir. For reconditioning, I would want to be there to put my bid in to encourage the customer——

Q. You would have been glad to recondition it for whoever bought it; is that right?

A. Yes, sir.

Mr. Blackman: That is all.

Mr. Abbott: I have one more question.

The Court: This must stop sometime, gentlemen.

Mr. Abbott: A new matter has been reopened on counsel's last examination. [147]

The Court: Proceed. One question.

Redirect Examination

By Mr. Abbott:

Q. Was that a sale conducted under the auspices of the General Services Administration, with the proceeds payable to the Treasury of the United States, Mr. Duly?

A. The sale of the airplane in Lancaster in April?

Q. Yes. A. Yes, it was.

Mr. Abbott: No further questions, your Honor.

The Court: All right. Mr. Duly, you may step down. You are excused.

(Witness excused.)

The Court: Is there any objection on the part of any member of the jury to reconvene tomorrow morning at 9:30? If not, we will reconvene at that time.

Before we separate, members of the jury, I would admonish you again of your duty not to converse or otherwise communicate among yourselves, or with anyone else, upon any subject touching the merits of this trial, and not to form or to express an opinion on the case until after it has been finally submitted to you for your verdict.

You are now excused until tomorrow morning at 9:30.

(Thereupon the jury retired from the courtroom.) [148]

The Court: Is it stipulated, gentlemen, that the jury have retired from the courtroom?

Mr. Abbott: So stipulated.

Mr. Nelson: So stipulated.

Mr. Blackman: So stipulated.

The Court: How much longer will the Government's case be?

Mr. Abbott: I anticipate only half an hour to an hour further, your Honor.

The Court: Do you have something, Mr. Blackman?

Mr. Blackman: Yes, your Honor. I was going to ask whether or not the Finns intend to be present tomorrow, because they will be a part of our case.

The Court: If you wish to call them as witnesses, you may.

Mr. Blackman: And may they be instructed to return?

The Court: They are instructed to return as witnesses, not as parties.

Mr. Blackman: As witnesses.

The Court: Tomorrow morning at 9:30. Anything further?

Mr. Abbott: Nothing further.

The Court: The court is recessed until tomorrow morning at 9:30 a.m.

(Whereupon, at 5:55 o'clock p.m., Wednesday, October 27, 1954, an adjournment was taken until 9:30 o'clock a.m., Thursday, October 28, 1954.) [149]

October 28, 1954; 9:30 A.M.

The Court: Cause on trial. Is it stipulated, gentlemen, the jurors are present?

Mr. Abbott: So stipulated.

Mr. Nelson: So stipulated.

Mr. Blackman: So stipulated.

The Court: The record will so show. You may call the Government's next witness.

Mr. George C. Finn: Your Honor, may I make a statement for the record with respect to a letter which I received from the Assistant Attorney General?

The Court: No, not at this time. The Government is putting on its case. That is, unless it has to do with some witness.

Mr. George C. Finn: It has to do, your Honor, with a jury trial.

The Court: No, we have settled that.

Mr. Charles Finn: We would like to submit, your Honor——

The Court: You may file the letter with the clerk, if you like, but we are not going to interrupt the trial to talk about a jury trial. The jury is sitting in the box.

Proceed, Mr. Abbott.

Mr. Charles C. Finn: There is one point I wanted to bring up. [153]

The Court: Proceed.

Mr. Abbott: May it please the court: The remaining matters in the Government's prima facie case are matters of stipulation. The record of the pretrial conference has been marked by the Government, and we have the stipulations there. Since most of those stipulations relate to formal matters, and matters which are not in issue, with the court's permission I will not take the time of the jury to read them now, but will request permission to read whatever stipulations are pertinent to the matters submitted to the jury, and will leave that matter to the final argument.

The Court: It seems to me it would be better if you would reduce them to a written document, and have all the parties sign.

Mr. Abbott: I question, your Honor, whether all of the parties will sign any document to be submitted at this point.

The Court: If their stipulations were made at

the pretrial hearing, they will be deemed signed, whether they sign them or not. The parties are bound by the stipulations made at the pretrial hearing, whether they feel they are bound today or not. You may proceed as you choose.

Mr. Abbott: May it be understood, however, that those stipulations are before the court, and may be read to the jury to the extent they are pertinent at the time of final argument. [154]

The Court: You are referring to the record in the pretrial proceedings?

Mr. Abbott: I am, your Honor.

The Court: There are three volumes, pages 1 to 190, 191 to 253, and 254 to 348.

Mr. Abbott: Yes, sir, there are. For further identification, the dates are Thursday, October 14; Friday, October 15; and Monday, October 18th, of 1954.

The Court: Very well. The Government now rests?

Mr. Abbott: The remaining matters outlined by the Government in its opening statement are matters of rebuttal, your Honor. This concludes the Government's prima facie case, and we rest.

The Court: Does the Vineland School District or does the defendant Bancroft wish to proceed at this time?

Mr. Nelson: Yes, your Honor. We desire at this time, your Honor, on behalf of Peter A. Bancroft to move the court that the action of the Government against Mr. Bancroft of inducement of the breach of the Form 65 agreement be dismissed,

inasmuch as the Government has not shown one iota of evidence whatsoever that Mr. Bancroft induced a breach of this Form 65 agreement, and they haven't presented any evidence whatever that he intended to do so, which is the basic element of this action, and, in fact, when they placed Mr. Bancroft on the stand, they elicited evidence to the contrary, and that is, [155] that when he released the aircraft to the defendants Finn, he believed that they had the consent from Washington. That, also, they have not shown that, as an agent of the District, he was not privileged to induce the District to breach the contract, if they so desired, and I believe that in our memorandum of authorities we have shown that he could not do that, even if he was malicious in doing so, as an agent of the District.

The Court: Does the Government oppose the motion?

Mr. Nelson: I might state one more ground for the record.

The Court: I thought you had finished your grounds. Complete your statement.

Mr. Nelson: And that is that the Government has not shown that Peter A. Bancroft was the proximate cause of any breach, if any breach occurred; that the proximate cause, if any, was shown to be the defendants Finn. [156]

Mr. Abbott: Your Honor, the motion made by Mr. Nelson is well taken. However, the Government does ask leave to amend to conform to proof to show a conversion by Mr. Bancroft. Actually, the essential elements of that cause of action appear

in the complaint and the amended complaint, although not expressly so denominated, and it is upon that theory, and no other, that the Government will proceed against Mr. Bancroft.

The Court: As a converter?

Mr. Abbott: As a converter of the C-46A aircraft in suit. The evidence has shown Mr. Bancroft signed the bill of sale, that he delivered possession of the aircraft to the defendants Finn. If the Government, as it contends, is entitled to the possession of the aircraft at the time when those events occurred, he has in fact converted Government property.

When I say that the Government requests leave to amend to conform to proof, I simply request we be able to set out a separate cause of action which would more expressly and concisely contain those matters which appear at various points in the amended complaint now on file.

Mr. Nelson: If the court please, we certainly object to amending pleadings at this time to conform to evidence which isn't even before the court; particularly in the middle of an action of this nature. We are obviously surprised, and [157] I believe, prejudiced by the action.

The Court: I shall not rule upon that. I don't understand that to be a motion to amend at this time. Or, is it a motion to amend at this time?

Mr. Abbott: It is a motion to amend at this time, your Honor.

Mr. Nelson: May I also point out, your Honor, that the action which the Government is attempting

to place before the court here also requires an intent to convert, and that certainly the witness indicated already that during the Government's case that he gave possession based upon the Finns' representation that they had obtained these consents, and where on earth can the intent be?

The Court: I will submit the Government's motion at this time and deny defendant Bancroft's motion at this time, without prejudice to a renewal at a later stage in the case.

Mr. Nelson: Am I to understand the inducement action is still before the court?

The Court: Yes.

Mr. Nelson: If the court please, I have one other motion to present at this time. And that is a motion that the Government's action against the defendant Vineland School District be dismissed.

I do this on two grounds: one, that on the face of the pleadings that are before the court in this action, it can be [158] seen by reading the regulations that govern this Form 65, in which the agreement between the District and the Government was entered, is not in accordance with the regulations. And I wish to point that out to the court at this time.

Regulation 4, which was in effect at the time of this agreement—it went into effect on May 31st of 1946, and the agreement took effect on July 25th of 1946—provided as follows:

> "The disposal agency shall establish procedure to which educational institutions or in-

strumentalities may make written application for surplus aeronautical property."

I wish to point out, your Honor, that I am eliminating the Health Department agency, just limiting it to the educational institutions which are in point.

"Such procedures shall include——"

and we wish to emphasize the word "shall," which is mandatory——

"one, a certification that the applicant is an educational institution or instrumentality; and two, a certification of the purpose for which the property is to be acquired; and in the case of an aircraft agreement that it will not be flown except for purpose of research or experiment in connection with the science of aircraft; and three——" [159]

And this is the important item——

"agreement that the property will not be resold to others within three years of the date of the purchase without the consent in writing of the disposal agency, unless it is mutilated or otherwise rendered unfit for use, except for scrap."

In other words, your Honor, Regulation 4, that was in effect at the time of the agreement in this action——

The Court: What was the date of the agreement with the School District?

Mr. Nelson: The date of the agreement, your Honor—let's see. It was not effective, however,

until July 25th, when the plane was transferred, because that was the consideration that the Government was to give.

The Court: Then the date of it for our purposes is July 25th—of what year?

Mr. Nelson: Yes, your Honor.

The Court: What year?

Mr. Nelson: 1946.

The Court: Your point is that the limitations upon disposing, at the most, is three years, is that it?

Mr. Nelson: Yes, your Honor. And within that three years it could be disposed of even without the consent of the authority if it was determined as unfit, except for scrap. And here, very clearly, the transfer, if there is a transfer [160] to the Finns, occurred more than three years later, and certainly the War Assets Administration Form 65 did not so provide, and the disposal agency does not have the right, under law, of a mandatory provision, to set forth something in an agreement which doesn't exist in the law.

The Court: What does the agreement set forth that is contrary to the statute or the regulation?

Mr. Nelson: Form 65 agreement provides as follows, your Honor——

The Court: That is Exhibit——

Mr. Nelson: That is Plaintiff's Exhibit 1. The pertinent part thereof, as to three years,

> "That all acquired property, when unfit for the above purpose, will be sold only as scrap, and

then only after it shall have been rendered completely unfit and useless, except for its basic material content."

We wish to point out there, your Honor, that the agency has attempted to restrict the sale only as scrap, and then only after it has been reduced to its basic material content, when the regulation merely said it could be sold as scrap if they found it useless.

"Then sales consummated within three years of the date of acquisition must have prior approval of the disposal agency." [161]

Well, what about sales after the three-year period that we have in this situation? The regulation would never have put the three-year period and said not to be sold within three years if they don't mean after three years it could be sold; and there are no restrictions whatsoever.

And those things appear on the face of the pleadings before the court, your Honor, and we feel the Government's action should be dismissed on that point, at this time, alone; that they have not proved a prima facie case, and the School District had a right to do as it pleased with the aircraft.

I have one other, and that is the phase of illegality. If the Government would like to argue this point of the agreement first, and clear that phase up, I will take up the illegality second; whichever seems to be convenient for the court and the Government.

The Court: You mean the contention that the arrangement was beyond the authority of the district?

Mr. Nelson: Yes.

The Court: You may make that point. I don't care to hear argument on that at this time.

Mr. Nelson: All right. The second point of the motion to dismiss this morning against the Government is this matter that the pleadings show on their face that the School District, when it entered into this agreement with the defendants Finn, acted beyond the scope of their authority. It does not appear [162] that this action was intentional on their part, but as this court well knows that if the governmental agency acts beyond the scope of its authority, whether they intend to do so or not, it is not a proper act, and is a void agreement; in fact, whatever action they take is void and null, as a public policy matter.

The Court: I take it all these grounds that you urge in support of the motion for dismissal as to the Vineland School District, you would urge in support of your previous motion as to defendant Bancroft?

Mr. Nelson: Yes, I would.

The Court: May it be so understood?

Mr. Abbott: It is so understood, your Honor.

Mr. Nelson: Now, in detail, as to the illegality argument, I wish to point out where they appear on the face of the pleadings.

The Court: That is covered in your brief, isn't it?

Mr. Nelson: Yes, your Honor.

The Court: You don't——

Mr. Nelson: I will refer to the brief in pointing this one of barter and sale in violation of competitive bidding statute, and we submit the motion at this time for Government's argument.

Mr. Blackman: Before counsel replies, so that he may have the opportunity to reply to both, your Honor, may I make [163] a similar motion?

The Court: Do you have a motion? Do you adopt the grounds that have been stated by Mr. Nelson?

Mr. Blackman: I do, your Honor, in making a similar motion on behalf of the defendant International Airports, Inc., and I would like to point out, in addition to the points made by Mr. Nelson, that the current 1946 regulation superseded an earlier 1944 regulation, which contained the same wording as is contained in Government Form 65 agreement. Yet when the regulation was changed the contract was never changed, and we submit that the contract, by purporting to adopt the wording in an earlier regulation superseded by duly constituting authority, was to that extent invalid.

We would also adopt the grounds stated by Mr. Nelson insofar as International is concerned, the Form 65 agreement only purports to recite a covenant which would be binding between the parties; namely, between Vineland and the Government. We don't believe the covenant was valid for the reasons that have been pointed out by Mr. Nelson. But in any event, no way binding upon International

Airports. And we feel that for that reason, as well, the Government has no claim of title to the airplane.

We also would point out that under the 1946 regulation the airplane could only have been disposed of by sale, and the wording in just two very brief lines is very clear on that [164] point. The regulation section 8304.7 states,

> "Provided, however, that after June 30, 1946, transport aircraft shall be disposed only by sale."

This airplane was disposed of July 10, 1946, some 10 days later. It was actually delivered nearly a month later.

The Court: Does the Government oppose the motion?

Mr. Abbott: The Government does, your Honor.

The Court: First, do the defendants Finn wish to make any motion, join in any motion?

Mr. Charles C. Finn: We are not here, your Honor, on the same grounds as before.

The Court: Very well.

Mr. Abbott: The first point raised by counsel, your Honor, in support of the motion is that the Form 65 agreement is one that is in contravention of the applicable regulation. Because it is so important to note several words in that regulation, I will take the liberty of reading a portion of it again, even though counsel has read it.

> "The disposal agency shall establish procedure pursuant to which educational and pub-

lic health institutions may make written application for surplus aeronautical property."

and so forth.

Such procedures shall include—this regulation, your [165] Honor, describes a minimum standard. Nowhere in the regulation, expressly or by implication, can we find any language which even vaguely suggests that an agency cannot go beyond the minimum standard and impose other procedures.

The Court: Your point is that the effect of the regulation, I take it, is that the administrator could not go beyond the regulation, but he could add restrictions to the regulation?

Mr. Abbott: He had to do at least as much as the regulation required.

The Court: But he could add additional restrictions if he felt so advised, but he would have to include in any arrangement the restrictions imposed by the regulation; at least that much?

Mr. Abbott: That is our point, your Honor.

The Court: What about the contention just made by Mr. Blackman that under Section 8304.7 the only disposition authorized of such aircraft at this time was by sale?

Mr. Abbott: That section, your Honor, from its context arrangement and language is obviously a section relating to the commercial disposition of aircraft by War Assets Administration.

As is apparent from the entire statutory organization, there were two primary methods of disposition. One was by commercial sale at commercial

prices. The other was by disposition to educational, and other charitable and public institutions for public purposes at a nominal cost.

The regulation to which Mr. Blackman refers is one which controls the commercial sale only. [167]

I can go a step further, your Honor, and say this: that the Government maintains that the transfer is one which is within the statute and regulations, and, therefore, that whatever purportedly passed by the Form 65, in fact, did pass.

But if we are wrong here, then nothing passed, and the airplane has belonged to the Government, with no interest, possessory or otherwise, in anyone else from 1946 to the present time.

An illegal act by a Government officer, if such a thing occurred here, and we doubt it, would not convey title of any interest whatsoever.

So if counsel wished to urge that the Government officials exceeded their power, he says that the Government has title to the aircraft free and clear of any claim of any person whatsoever.

Mr. Nelson: I would like, your Honor, to answer a couple of the arguments that the Government has presented.

The Court: You may.

Mr. Nelson: I am sorry, Mr. Abbott. I thought you were through.

Mr. Abbott: I was just pausing for a moment.

The Court: I do not expect to decide these questions at this stage of the case, gentlemen.

Mr. Abbott: I might say, your Honor, in that connection [168] that most of these points have

been extensively briefed, and those points which are raised for the first time, either in this argument or in the memorandum of authorities filed by the defendants Vineland or International on Monday of this week, as to those points which are new the Government will request leave to file a brief for the court.

The Court: Can you have it here by this afternoon or tomorrow?

Mr. Abbott: It will be impossible to do it by then, your Honor.

The Court: Very well. I don't expect to pass upon these questions of law at this time.

Mr. Nelson: For the record, your Honor, I would like to present two items in answer.

The Court: You may.

Mr. Nelson: The first item, your Honor, is this matter of: Could the agency add additional restrictions?

I believe that the law is clear that the agencies on occasion can enter into additional matters which are to the benefit of the Government. However, can a disposal agency, or any agency of the Government, take a regulation that is passed, as Mr. Blackman pointed out, in 1944, which said in effect you cannot sell until after the 3-year period, and then that same regulatory body comes along two years later and says, "No, gentlemen, you shall provide in your agreement [169] that if they are resold within the 3-year period, that you are to get consent"?

Isn't that changing the agreement, in telling them that after the 3-year period they can do anything they wish, and can the disposal agency, in view of that second regulation, turn around and continue to use the language of the old regulation?

The Court: That is a question of law.

Mr. Nelson: Yes.

The Court: Of course it may well be that the regulation adds up to this, that prior to that period there could not be a sale under any circumstances except as expressly set forth in the regulations. Later on the conditions of limitation may have been relaxed, and the Government say, "You may go farther, if you like. You may sell, but if you do sell, then you must sell under certain conditions."

Mr. Nelson: Yes.

The Court: Under at least a minimum of certain conditions, and the administrator might have discretion to exact other and further conditions. Those are questions of law that are not easily answered, and I don't expect to answer them definitively now.

Mr. Nelson: I think the court is absolutely right. As a matter of fact, however, we do wish to point out that it wasn't "may." It was a "shall." [170]

The Court: Of course, sometimes "shall" is purely directory. Have you any authorities to show that "shall" means "must," or does it mean "may"?

Mr. Nelson: I am as well aware as the court, sir, that "shall" sometimes may mean "may," but as a general matter it does mean "mandatory."

The Court: There is no question that so far as regulations are concerned, and so far as they are valid and promulgated pursuant to the statute, they have the same effect as the statute, and they are binding upon the Government officials, as well as persons who deal with the Government officials. In my opinion, there is no question on that ground. If the Government official makes regulations and he promulgates them, generally speaking, he is as much bound by them as the public generally is bound by them. They become in effect a part of the statute, if they are valid.

Mr. Nelson: One further point on this matter of these additional restrictions, and this change in 1946. I just wish to call the court's attention, when it is reviewing this matter, to the purposes for which the War Surplus Act was adopted, and that is, basically, to prevent the market from being flooded with these war surplus aircraft, and that in 1944 that was a far more serious problem than it was in 1946. I believe it was the intent of the regulatory body in 1946 in removing the restriction of the sale of these properties [171] after the 3-year period, that they then felt that five years had passed, and a sufficient time had elapsed so that these aircraft could then go on the market.

One further thing as to this agreement saying, if you so find, that this agreement is invalid, that it is therefore thrown out and the aircraft has not transferred.

The court is well aware of the rule, I am sure, that if a part of an agreement should fail, that that

does not invalidate the entire agreement; that the agreement can be read in accordance with the regulations as to those parts which do fail, and the aircraft still passes to the District, only instead of the manner in which it states in the agreement, in accordance with the law in effect.

Mr. Blackman: Before the Government replies, just to follow our usual continuity, may I add a word?

The Court: If you feel you should.

Mr. Blackman: I will make it very brief. The Government has stated that in reviewing the context of the regulation counsel feels that, in his opinion, Section 8304.7, which is that which requires the disposal by sale only after June 30, 1946, does not apply to schools. We submit that there is nothing to be found in that section that limits it to commercial disposal.

The Court: That is all covered in your brief, isn't it?

Mr. Blackman: We haven't made that statement, your [172] Honor, as I have just put it to you there, but we have raised the point regarding the applicability of that section to this transaction.

The Court: Your statement is now that there is nothing anywhere to indicate that Section 8304.7 is applicable only to commercial sales?

Mr. Blackman: Yes, your Honor, that is right; and adding to what Mr. Nelson has just said, we are confident that the court also will take into consideration some of the other expressed objectives of Congress in enacting the Surplus Property Act of

1944, two of which directly apply here and are as follows:

> "to dispose of surplus property as promptly as feasible * * *"

Then I am leaving out one clause, or I can read it all:

> "without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, and to facilitate prompt redistribution of such property to consumers."

Obviously, the resale of property was contemplated by the Congress. Next:

> "to dispose of surplus Government-owned transportation facilities"—and an airplane would obviously be one—"and equipment in such manner as to promote an adequate and economical national [173] transportation system."

We feel that those are two objectives which Congress has written into this Act, which belong in a fair consideration of the merits of this case.

The Court: Do you find anything in the regulatory scheme such as Mr. Abbott suggested, that there are two different plans or there were two different plans formulated by the Administrator, and one deals with educational and like institutions, and the other commercial transactions?

Mr. Blackman: Your Honor, answering that, candidly, I do.

However, I would like to go on and explain that I find that the regulations are set up as a unit, with one section out of that unit devoted to disposal to educational institutions.

Now, that one section is written into the regulations, but nowhere does it attempt to negative any of the other regulations that are also written into the same Regulation No. 4, and since it followed the 1944 regulation and changed the express wording of the 1944 regulation with respect to disposal, then we assume the Board, in promulgating that regulation, had in mind the change in the regulation, which was limited, just the same as it did this Form 65, Plaintiff's Exhibit 1. The thing is that somebody overlooked it and didn't change it. [174]

Mr. Abbott: Some serious statements are made by counsel that I think require an immediate answer.

First, this question of arrangement of the regulation. I appreciate that it is difficult for the court to follow the matter if the court does not have a full copy of the regulation before it, and I have but one copy here now, but the regulation is reprinted in the Federal Register, and may be viewed there in its entirety.

The entire regulation on the subject of disposal of aircraft, and components, and parts of aircraft is entitled "Part 8304." Each of the subsections is a decimal division of 8304. That is, we have 8304.1, 8304.2, and so on.

The regulation, when read in its entirety, is obviously a regulation which provides for two

separate types of disposal. One for commercial sale, and the other by disposal for educational and public health purposes.

On the first topic we have Section 8304.7, the section to which counsel has referred, which is entitled, "Disposal of Transport Aircraft," and I think it helps to read that regulation in full rather than just the small portion of it that has been quoted by counsel:

> "In the disposal of transport aircraft, the disposal agencies shall establish, with the approval of the Administrator fixed prices for such aircraft. In fixing such prices, the disposal agency [175] should give consideration to the potential earning power of the aircraft in relation to other matters, its estimated economical life in scheduled and non-scheduled commercial service, the degree of modification required for conversion to civilian use and the relationship between supply and demand. If the disposal agency determines that transport aircraft are beyond economical repair or that a fixed price cannot be readily established because of obsolescence, specialized design or other exceptional circumstances, such aircraft may be disposed of by competitive bidding or other method of sale considered appropriate by the disposal agency. The disposal agencies shall attempt, whenever practicable, to dispose of surplus transport type aircraft by sale rather than by lease. Transport aircraft of models

> approved by the Administrator, may, however, be leased by the disposal agency upon terms approved by the Administrator''—and now the language to which counsel referred—''Provided, however, That after June 30, 1946, transport aircraft shall be disposed of only by sale.''

That is an entire reading of the entire text of Section 8304.7.

There are subsequent sections dealing solely with commercial [176] disposition, and then there is a section having equal dignity with 8304.7, and entirely separate from it. That is Section 8304.11, entitled, ''Disposals for Educational and Public Health Purposes.'' Here we find an entirely different set of criteria for agency determination of the manner of disposition. The section reads, commencing with the beginning of the text:

> ''Where the disposal agency determines that any item of surplus aeronautical property is commercially unsalable''——

And I will just stop to refer to the definition of that term in Section 8304.1, Subsection 2:

> '' 'Commercially unsalable property' as used herein is distinguished from property of no commercial value as used in Part 8319[1] and means property which has no reasonable prospect of sale at or above a minimum price established by the disposal agency, or where such minimum price has not been established, no

reasonable prospect of sale except as salvage or scrap."

Now, going ahead with Section 8304.11:

"Where the disposal agency determines that any item of surplus aeronautical property is commercially unsalable, disposal may be made to educational or public-health institutions or instrumentalities [177] as provided in this section. The disposal agency shall compile a list of such items and shall ascertain fixed prices which will reflect the benefit which has accrued or may accrue to the United States from the use of such property by educational or public-health institutions or instrumentalities. Such lists shall be submitted to the Administrator, and if approved, will be published by order hereunder. The disposal agency is authorized to dispose of such property to educational or public-health institutions or instrumentalities at the prices so approved: Provided, however, That no such disposals at the prices so approved may be allowed to any nonprofit institutions which are not exempt from taxation under Section 101 of the Internal Revenue Code."

The sections themselves are, with other provisions which have been previously discussed in this argument, provisions for the minimum disposal procedures, certification, and agreement with the——

The Court: What does "disposal" mean? Sale?

Mr. Abbott: The disposal would mean, your

Honor, whatever the Administrator acting within the regulations in the statute wanted to make it.

The Court: But this Exhibit 1 here states, "In consideration [178] of the transfer to Vineland School District, the Vineland District agrees as follows." What is that? A bill of sale to the airplane, with some subsequent conditions attached to it?

Mr. Abbott: As a matter of fact, Plaintiff's Exhibit 1 does not describe any particular property, of course. It is an agreement, by its express terms, which was applicable to all subsequent transfers to the school district.

The Court: What are "transfers," first?

Mr. Abbott: In this case probably bailment is the best definition.

The Court: A transfer usually imports the transfer of title, doesn't it? "Transfer" is usually an all-inclusive term.

Mr. Abbott: I take it, your Honor, the term "transfer" can mean as little or as much of the total bundle of sticks which constitute ownership, as is indicated by the tenor of the entire document in which it appears.

One could transfer a life estate in property, one can transfer a leasehold in property, one can transfer a right to use property for a short time.

The Court: You don't use the verb "transfer" in connection with leases, do you?

Mr. Abbott: One might transfer a leasehold interest, your Honor. [179]

The Court: Yes, once the leasehold is created,

but the creation of a leasehold interest is usually not referred to as a transfer.

Mr. Abbott: I think this point is clarified, your Honor, by the only other instrument relating to the nature of the interest transferred, which is the "Release of Custody" form, Plaintiff's Exhibit 4. That form by its very title——

The Court: Let me see it, Mr. Clerk.

(The document was handed to the court.)

The Court: Even a grant of real property is included within the term "transfer," isn't it? It has been for centuries, hasn't it? The old common law deeds of land are referred to as transfers, are they not?

Mr. Abbott: Surely, a deed of a fee simple estate is a transfer, but the term "transfer" would also encompass a number of other more limited interests.

The Court: Yes. But we don't usually refer to a lease as being a transfer, do we? Or the creation of the indenture itself as being a transfer?

Mr. Abbott: Whatever ambiguity that term might introduce into the relationship is clarified by Plaintiff's Exhibit 4, your Honor.

What was executed by the Government when the school district took possession of the aircraft? Was it a bill of sale? No, it was a form entitled, "Release of Custody of the [180] Aircraft," and that is all, and all that appears on that form is language of transfer of possession.

The Court: How does that clarify anything? It seems to me that might make it more ambiguous.

Mr. Abbott: Form 65, your Honor, could not be a bill of sale, could not be a title document. At the time of its execution, no particular property, no particular item of property had even been selected to be the subject of transfer pursuant to the Surplus Property Act of 1944.

The Court: That might be an ambiguity, but the question is what does the verb "transfer" mean? There might be an ambiguity in the document as to the property covered, but what does the verb mean?

Mr. Abbott: The verb means, your Honor, whatever particular type of transfer might thereafter be made.

I suppose it is quite possible that there could have been a transfer of title thereafter, but that did not occur.

The Court: That would be the first thing that would come to your mind, wouldn't it? A transfer imports a change of title, doesn't it?

Mr. Abbott: If the administrative agency, your Honor, had given a bill of sale to some particular piece of aeronautical property selected after the date of the execution of Form 65, then we would take it, take the verb "transfer" in the general statement of Form 65 and say on that transaction where [181] a bill of sale was given a transfer meant title.

In this case we have a bailment arrangement contemplated by Plaintiff's 4, "Release of Custody," and "transfer" means transfer of possession of a bailee's interest.

The Court: I have your point. I shall not rule, as I have stated, definitively upon these questions of law at this time. We want to get the facts first. So I will deny the motion and hear the evidence.

Mr. Abbott: I did have other arguments in answer to the points raised by Mr. Blackman. If your Honor prefers, I can reserve those until later.

The Court: If you wish to file a memorandum on them, gentlemen, get the memorandum in as quickly as you can.

Mr. Abbott: We will do so, your Honor. I would like the opportunity of working on it over the week end, if that is possible.

The Court: We will see what the situation is.

Mr. Abbott: Thank you.

The Court: Do you wish to proceed first, Mr. Nelson, with your case?

Mr. Nelson: I will proceed, your Honor.

Without belaboring that last point, your Honor, I do wish to point out that Mr. Abbott has mentioned this "Release of Custody," and I believe there was also a Sales Receipt involved besides the Release of Custody, and the very title of [182] that indicates——

The Court: Those are questions of law that really do not interest the jury, and I want the jury to hear the evidence. We can discuss it in great detail sometime when we are not taking up the time of the jury. I merely wanted to make the record upon your motion, and rule upon it. I didn't intend that the argument go to this length.

You may proceed. Call your first witness. [183]

Mr. Nelson: I would like at this time to call Mr. Charles Finn.

Mr. Charles C. Finn: Your Honor, I would like to have the court explain the position which we——

The Court: You are just an ordinary witness. Take the stand.

Mr. Charles C. Finn: I would like to submit, your Honor, I will take the stand if the court orders, but——

The Court: I order you to take the stand just as any other witness. You are a party, and for that reason if you were considered to be adverse to this party who is examining you, you may be cross-examined first. But you are to be examined like any other witness. Take the stand.

Swear the witness, Mr. Clerk.

CHARLES C. FINN

called as a witness on behalf of the defendant Vineland School District, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Charles C. Finn.

The Clerk: Be seated, please. [184]

Direct Examination

By Mr. Nelson:

Q. What is your occupation, Mr. Finn?

A. I am in the aircraft business.

Q. Would you explain that in a little more detail?

(Testimony of Charles C. Finn.)

A. Yes. We bought an airplane, N-111H, which we own; which we leased to International Airports, Inc., for which there was an advance of money, $15,000, pursuant to a mortage. And subsequently, the Government seized the airplane.

The Court: The question was, what is your business, not about this lawsuit. Is this lawsuit your business, this plane involved here?

The Witness: It certainly is part of my business, your Honor.

Q. (By Mr. Nelson): There is no necessity to go into those points. That is not what I desire. Just a mere statement of your occupation.

Do you know a Mr. Duly that testified here yesterday for the Government?

A. Yes, I do.

Q. After you took possession of the—physical possession of the aircraft and flew it down to Los Angeles to have work done on it, did you call on Mr. Duly in order to obtain work from his agency, if possible?

A. No, I didn't call on his—call upon Mr. Duly at [185] that time.

Q. At what time did you call on Mr. Duly?

A. Prior to taking the aircraft to International Airports.

Q. And did Mr. Duly indicate at that time what his opinion was of the value of the aircraft?

A. Yes. He told us to throw gasoline on it and burn it up. It was an A model and was——

(Testimony of Charles C. Finn.)

Mr. Abbott: We are going to object to that. There has been no proper foundation for this testimony.

The Court: What is the purpose?

Mr. Nelson: Mr. Duly has testified here, your Honor, as to the value of this aircraft, and the opinion——

The Court: You laid no foundation to impeach him, did you? You gave him no chance to explain any prior contradictory statement he may have made. Do you wish to call him for that purpose? You may do so.

Mr. Nelson: Is Mr. Duly present in court this morning?

Mr. Abbott: He is not, but I will contact him if so desired.

The Government moves that portion of the answer which came in prior to the objection be stricken.

The Court: Motion granted, and the jury is instructed to disregard it.

Do you wish Mr. Duly brought in? [186]

Mr. Nelson: Yes, I do, your Honor.

The Court: Mr. Abbott, will you arrange to have him here, if possible, this afternoon?

Mr. Abbott: I will attempt to reach him, your Honor.

The Court: Perhaps you could have someone, now.

Mr. Nelson: Would the clerk please show to the witness Defendants Finn Exhibit B?

(Testimony of Charles C. Finn.)

Q. (By Mr. Nelson): Would you read the title of this exhibit, Mr. Finn?

A. "Reconstruction Finance Corporation."

Q. Is it in the nature of an agreement?

Mr. Abbott: The document speaks for itself. We would object.

The Court: Sustained.

Q. (By Mr. Nelson): What is the date on this agreement?

The Court: It speaks for itself.

Mr. Abbott: Same objection.

Mr. Nelson: I was attempting to get it into the record, your Honor.

The Court: May it be stipulated the document has a certain date?

Mr. Nelson: I believe the agreement already has been stipulated to, and I would like to renew the stipulation at this time that that is a genuine document and as it purports to be. [187]

The Court: What is the date you offer to stipulate?

Mr. Nelson: The date is September 18, 1945.

The Court: So stipulated?

Mr. Abbott: So stipulated.

Mr. Blackman: So stipulate.

Q. (By Mr. Nelson): Where did you obtain this agreement, Mr. Finn?

The Court: This Exhibit B, is that what you are referring to?

Mr. Nelson: Yes, Exhibit B.

Mr. Abbott: We would object. The document

(Testimony of Charles C. Finn.)

appears to be one used in connection with a transaction in no way related to that before the court today; has no bearing; entirely irrelevant and immaterial.

The Court: Preliminary. Overruled.

Where did you acquire Exhibit B?

The Witness: I did not acquire this exhibit.

Q. (By Mr. Nelson): How did you obtain this exhibit, Mr. Finn?

A. Just handed to me, now. My brother obtained this exhibit, and I feel—my brother obtained the exhibit.

Mr. Nelson: I have no further questions, your Honor.

The Court: Any further questions of Charles C. Finn?

Mr. Abbott: Not at this time, your Honor.

The Court: You may step down, Mr. Finn. [188]

(Witness excused.)

The Court: The next witness?

Mr. Nelson: I would like to call Mr. George C. Finn, your Honor.

Mr. George C. Finn: I also am appearing as an ordinary witness, your Honor?

The Court: Yes.

Mr. Charles C. Finn: In that respect, your Honor, may I ask the court a question?

The Court: Yes.

Mr. Charles C. Finn: We are confused as to appearance as an ordinary witness; statement—

maybe testifying against ourselves without any proper defense in the trial——

The Court: All you are called upon as a witness to do is testify to the truth. And no one is immune from that.

Mr. Charles C. Finn: Thank you.

The Court: Even the attorneys might be on the stand in the case to testify.

Please swear the witness.

GEORGE C. FINN

called as a witness on behalf of defendant Vineland Elementary School District, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, [189] please?

The Witness: George C. Finn.

The Clerk: Be seated, please.

Direct Examination

By Mr. Nelson:

Will the clerk please hand Defendants' Finn Exhibit B to the witness?

Q. (By Mr. Nelson): Do you recognize this agreement, or this exhibit, Mr. Finn?

A. I do.

Q. Will you tell the court where you obtained this agreement?

A. I obtained this agreement from Mr. Bradley of the Federal Security Agency in Washington, D. C., in approximately April of 1952—'51, pardon me. '51.

(Testimony of George C. Finn.)

Q. At the time that you discussed that agreement with Mr. Bradley, did you discuss other matters in connection with surplus property?

A. I did.

Q. And particularly this subject aircraft?

A. I did.

Q. Would you state those conversations to the court?

A. I went specifically to Mr. Bradley's office to obtain the regulations and requirements under which disposal for this aircraft in suit would be administered. And in the [190-191] discussion we discussed the Form 65 agreement. We discussed the regulations that were discussed here this morning. And I asked Mr. Bradley why was there such a discrepancy between the regulations and the Form 65 agreement; especially in respect to the three-year statute of limitations.

Mr. Abbott: We object to any testimony in which the witness expressed an opinion of law or an opinion was expressed to him on a point of law.

The Court: Sustained.

Q. (By Mr. Nelson): Would you continue with the conversations that you had with Mr. Bradley?

A. I said, "Mr. Bradley, what accounts for this discrepancy——"

Mr. Abbott: Your Honor, this is going into the same point on which the prior objection was made.

Mr. Nelson: Will you please refrain from making statements which would be a conclusion of law, either yours or Mr. Bradley's.

(Testimony of George C. Finn.)

The Court: What is the purpose of this, Mr. Nelson?

Mr. Nelson: The purpose of it, your Honor, is to show admission by governmental agent that the Form 65 agreement does not comply with the regulations, in their opinion, and that a mistake was made in the formulating of the Form 65 agreement.

The Court: That is purely a conclusion of law on the [192] part of some person who may not have had any authority whatever in the matter.

Mr. Nelson: I have no further questions.

The Court: Any further questions of this witness?

Mr. Blackman: In the court's procedure, would it be in order for me to cross-examine the witness along the same lines—I mean, with respect to the same subject matter counsel has?

The Court: Yes. As a matter of order of proof, I like to dispose of a witness when he is on the stand.

Mr. Blackman: I hadn't assumed that with respect to Charles Finn. I assumed counsel would put on its case and then we would put on ours.

The Court: No. The evidence, when it has been produced, unless specifically ruled upon, will be introduced for all purposes.

Mr. Blackman: I see. Then I will have to necessarily cover other matters Mr. Nelson has not covered with this witness.

The Court: You may.

(Testimony of George C. Finn.)

Mr. Blackman: And then may I have the privilege of calling Mr. Charles Finn, in order, at a later time?

The Court: Yes, you may. [193]

Cross-Examination

By Mr. Blackman:

Q. Mr. Finn, when did you first see the aircraft which now bears the registration N-111H?

The Court: The aircraft in suit here?

Mr. Blackman: The aircraft in suit.

The Witness: Approximately May or June of 1950.

Q. (By Mr. Blackman): And was your brother with you at that time? A. Yes, sir.

Q. Now, did you have some negotiations with the Vineland School District which led to the signing of the contract, Exhibit B, Vineland's Exhibit B, the contract dated February 28, 1951?

A. Yes, sir.

Q. And as a part of that transaction were you given a bill of sale to that aircraft?

A. Yes, sir.

Mr. Blackman: Will the clerk put before the witness Defendant International Airports' Exhibit A, please?

Q. (By Mr. Blackman): Will you refer to a document entitled "Bill of Sale" in that exhibit?

A. Yes, sir.

Q. And the entire exhibit, Mr. Finn, is a group of certified copies of documents from the Civil Aeronutics [194] Administration in Washington.

(Testimony of George C. Finn.)

Now, directing your attention to the document entitled "Bill of Sale," I will ask you to examine that, please. A. Yes, sir.

Q. And is that the bill of sale which was delivered to you by the Vineland School District in connection with this airplane?

A. This is a certified copy of that document, yes, sir.

Q. Now, after receipt by you of that document, what did you next do in connection with the airplane?

A. I went to Washington to—pursuant to my contract—to see if there were any restrictions upon flying the airplane, and if there were any, to have them removed.

Q. And who did you see in Washington?

A. I first went to the Civil Aeronautics Administration and met Miss Margaret O'Neil.

Q. Who is she? A. Registrar of aircraft.

Q. For the Civil Aeronautics Administration?

A. For the Civil Aeronautics Administration.

Q. All right. And did you have a conversation with her? A. I did.

Mr. Abbott: I will object, your Honor. Any conversation with a representative of the Civil Aeronautics Administration would be wholly immaterial and void. The Civil Aeronautics [195] Administration is not given any authority to take any action with respect to aircraft in the hands of the disposal agencies, and any registration by C.A.A. is under its statute governing legislation,

(Testimony of George C. Finn.)

and not evidence of title whatsoever; and under the regulation promulgated under that statute any registration to a person who is not the owner is null and void, and may be cancelled.

Mr. Blackman: Your Honor, the object of this line of questioning is not to establish the registration certificate that was issued. That, of course, will be brought out. But the object is to show the procedures which the defendants Finn went through for the purpose of securing a waiver of the restrictions, if they secured such a waiver, and its effect on the Civil Aeronautics Administration in issuing the registration certificate which later was shown to International Airports; all being in the course of business. I think that if you just jump right into the middle of the thing, we don't have any continuity.

The Court: Isn't it sufficient to show that he went to this person and had a conversation with them about the plane, without attempting to show that some Government clerk, it may have been, presumed to know the law on the subject?

Mr. Blackman: Well, the capacity of the individual in question has been stated by Mr. Finn to have been the Registrar of Aircraft, I believe; I am not sure. [196]

The Court: But this isn't the Government agency having authority to deal with the surplus aircraft, was it?

Mr. Blackman: Only the Government authority having the power to registration.

(Testimony of George C. Finn.)

I will proceed, your Honor. I will see what we can develop.

The Court: I don't wish to preclude you, but let's stay away from any hearsay question of authority.

Q. (By Mr. Blackman): As a result of any conversation you had with Miss O'Neil, did you speak to any other Government official?

A. I spoke to the attorney for the Civil Aeronautics Administration, Mr. Howard.

Q. All right. You had a conversation with Mr. Howard. You have identified him. As a result of that conversation did you speak to any other Government official?

A. Mr. Howard referred me to Mr. Bradley's office, the Federal Security Agency, room 5526, General Services Building in Washington.

Mr. Blackman: Now, your Honor, for the purpose of the jury, may it be stipulated that the F.S.A. is the proper agency which has the power to deal with the waiver of the restrictions on this type aircraft?

Mr. Abbott: I can do better than that. I can give the exact delegation of authority in terms of the statute, of [197] regulations, if that will be agreeable.

Mr. Blackman: First, may we have an answer to that stipulation. And then if counsel wants to go ahead and read the law, I have no objection.

The Court: All you asked is the stipulation that the Federal Security Agency is the agency of the

(Testimony of George C. Finn.)

Federal Government having jurisdiction to deal with these matters?

Mr. Abbott: It is, and, your Honor, we so stipulate.

The Court: So stipulated by all parties?

Mr. Nelson: So stipulated, your Honor.

The Court: Very well.

Q. (By Mr. Blackman): And who is Mr. Bradley? I may refer to the F.S.A., Federal Security Agency. Have you ever heard it so referred to?

A. It was the Federal Security Agency, and took over from War Assets.

The Court: Let's don't get into these initials.

The Witness: F.S.A.

The Court: Let's have the energy to speak it out.

Mr. Blackman: All right. I was just thinking of the record.

Q. (By Mr. Blackman): Who is Mr. Bradley in the Federal Security Administration?

A. He was the chief of the Office of Compliance, or the disposal of surplus aeronautical property to educational institutions. [198]

Q. And approximately when did you have this conversation with him?

A. In the early part of April—last part of May, or—on a particular meeting was April 4th. I had several conversations.

Q. Pardon?

A. I had several conversations with him.

(Testimony of George C. Finn.)

Q. Is April 4, 1951, the first conversation you had with him?

A. No, sir. That was, the first conversation was approximately two weeks prior to that.

Q. And was that in person or on the telephone?

A. It was in person.

Q. Who was present at that time?

A. Mr. Bradley and myself.

Q. You have told us that was in a room in the Pentagon Building in Washington.

A. Mr. Bradley's office, Room 5526, General Services Administration Building, Washington.

Q. Very well. Now, will you tell us, as nearly as you can recall now, what was said by you and what was said by him at that time.

A. At that time I asked Mr. Bradley for information regarding any restrictions on the school aircraft. And he—— [199]

The Court: Did he tell you what aircraft he was talking about?

The Witness: Yes, sir, the Vineland School. He brought out the Vineland School file, and he showed me the Vineland School file, and the documents in it, and that was the first time I had seen Form 65, and I asked him about this Form 65, and all of the regulations upon which it was promulgated.

The Court: Mr. Clerk, will you place before the witness Plaintiff's Exhibit 1?

(The document was placed before the witness.)

(Testimony of George C. Finn.)

The Court: Will you refer to Form 65? Is that the document that you saw at that time?

The Witness: Yes, your Honor.

Q. (By Mr. Blackman): Very well. Continue with the conversation, please.

A. I said, "Mr. Bradley, is it necessary to scrap these airplanes?"

Mr. Abbott: I will object, your Honor, to any opinion that the witness expressed, or that the person to whom he was talking expressed. I take it, this conversation is to relate to some purported consent, and we want to object to testimony of that type.

The Witness: That is what I said to him.

The Court: Overruled. He may answer. You may give the conversation. The jury will understand that any opinion [200] expressed by some Government official as to what the regulations provide is not controlling. The regulations themselves are controlling. In other words, the regulations are not what some official says they are. The regulations are what the regulations themselves say they are.

Proceed.

The Witness: I asked him would he please point out to me the necessity for disposal of aircraft as scrap, that I wanted to fly it, and that I could buy the airplane as scrap, but it would be of a different value, if I was allowed to fly it it would be of a better value, and that I would like to have a ruling on that, how I could fly the airplane.

(Testimony of George C. Finn.)

And he said, "It is my opinion that this airplane must be scrapped."

And I said, "On what do you base this opinion?"

And he cited me Regulation 4.

And I said, "May I look at Regulation 4?"

And he gave me the citation for it, and he said, "You might look up all of the requirements of Regulation 4, if you care to."

And I said, "I would like to do that, and I will come back and see you later."

And I went up to the Army law library in the Pentagon.

Q. Just a minute. Was that the end of that conversation? [201]

A. That was the end of that conversation, yes, sir.

Q. Very well. Now, for continuity, what did you next do?

A. I next went to the Pentagon Army Law Library—correction—I first went to see a friend of mine, Major Dykman in the Judge Advocate General's office in the Air Force, and renewed old acquaintances.

Mr. Abbott: I will object to any conversation with the major, your Honor, because it will have no materiality whatsoever.

Mr. Blackman: I will accept the objection.

Q. (By Mr. Blackman): Mr. Finn, let me ask you to confine what you did to what you did in connection with Regulation 4 and any conversations you had with Mr. Bradley thereafter. I ask you

(Testimony of George C. Finn.)

what you next did in connection with Regulation 4, and if you went to the Law Library and looked it up say so, but if you asked somebody else about it, we cannot ask about your conversation.

A. This is Regulation 4, which I brought to the attention of Major Dykman.

Mr. Abbott: The same objection, your Honor. Apparently the witness is going to testify to a conversation with a member of the military establishment.

The Court: Don't give any conversation unless you are expressly asked to give it. You had some conversation with [202] the major, and then what did you do? Is that your question?

Mr. Blackman: Yes, it is.

The Witness: But the conversation was with respect to Regulation 4.

The Court: It does not matter what it has to do with. It might have been about a baby. You said you had a conversation. Then what did you do?

The Witness: The Major sent me to the Army Law Library, and told me where to research Regulation 4, and where to find it, and to bring it back to him when I found it.

The Court: Now, you are not going to give any of the major's expressions on the law. If you do, you will be in contempt.

The Witness: I am not going to do it.

Mr. Charles C. Finn: Your Honor, the major is an attorney there.

Q. (By Mr. Blackman): I assume you had a

(Testimony of George C. Finn.)

conversation with the Major after you had gone to the Pentagon Law Library; is that right?

A. That is right.

Q. As a result of that conversation did you have another conversation with anybody else over at the Federal Security Agency? A. I did.

Q. With whom? [203]

A. I had a conversation with Mr. Bradley, and a Mr. Heller, and a Mr. Davis, who are attorneys for the Federal Security Agency, and a conversation with Miss Margaret O'Neil, and Mr., oh, the attorney for the CAA, Mr. Howard, at a meeting of all of us in Mr. Bradley's office.

Q. All right. Now, who made the arrangements for that meeting, if you know?

A. I made the arrangements.

Q. Did you personally call each one of these individuals and invite them to this meeting?

A. I personally called them and asked them if they would come to a meeting to discuss this matter, toward my getting a registration and being able to fly this airplane.

Q. What was the date and time of this meeting?

A. The time was April 4th. It was approximately——

The Court: April 4th what year?

The Witness: 1951. It was approximately 10:00 o'clock in the morning, and it was in Mr. Bradley's office, Room 5526 of the General Services Administration Building.

(Testimony of George C. Finn.)

The Court: Would this be a convenient point to interrupt for the morning recess?

Mr. Blackman: Yes, your Honor.

The Court: You will be excused at this time ladies and gentlemen of the jury, for the morning recess, subject to the usual admonition. You are excused for five minutes. You may [204] step down

(The jury retired from the courtroom.)

The Court: Mr. Clerk, will you recess the court for five minutes.

(A short recess.)

The Court: Let the record show the jury are present. You may proceed. George C. Finn is on the stand.

Mr. Blackman: Miss Reporter, will you be good enough to read back the last question?

(The record was read.)

Q. (By Mr. Blackman): Now, will you tell us what was said by each of those parties, including yourself, at that time, to the best of your recollection?

Mr. Abbott: Your Honor, we will object to any part of the conversation except the statements by the representatives of the Federal Security Agency. There were one or two people there from some other government agency, according to the witness' testimony. We object to any statements by them.

Mr. Blackman: Your Honor, we can hardly get at this conversation piecemeal.

(Testimony of George C. Finn.)

The Court: Overruled. He may answer. Answer the question.

The Witness: I said, "The purpose of this meeting, ladies and gentlemen, is to determine whether or not I can fly a school airplane and get it registered without any [205] restrictions against the use of it. Now, it is my understanding," as I told them, "that a registration on the airplane will allow me to fly it, and will constitute a removal of any restrictions against the use of the airplane."

Mr. Abbott: Your Honor, we object, that the statement the witness has given are views of law expressed by him. I take it, the conversation relates to some purported consent of transfer by the Government, and I object on the ground that any views of law expressed are not relevant or material.

The Court: The jury will understand that the witness would not be the law, and if he were a lawyer, he is not determining the law here, so any opinions expressed at this alleged meeting as to questions of law are not binding.

I am allowing the statements made because it seems impractical to separate the wheat from the chaff, and to separate the conclusions from the other statements made. So, in order that you may hear it, why, you will hear the opinions as to the law along with anything else that was said, but you are to disregard any opinions as to the law if the court should later instruct you that the law is otherwise.

(Testimony of George C. Finn.)

The Witness: This is the conversation, as I remember it, your Honor.

The Court: I understand.

The Witness (Continuing): "——and that is what I would like to determine here at this [206] meeting?

I said, "There seems to be a discrepancy now, and we have both parties together. The Federal Security Agency has maintained that there was a requirement for scrapping the airplane, and the Civil Aeronautics Administration maintains that if I show proper title to the airplane, it can be registered and flown, but that I must show proper title. Now, I would like to know, since you are both together, what the positions of each of you is."

And Mr. Bradley said, "Well, our position is that we must follow the regulations in disposing of any school aircraft."

And I then said, "Well, I have researched the law on the regulations, and I have had this reviewed by Mr. Dykman—by Major Dykman, my friend." There are several Dykmans. There is a Major Dykman in the Judge Advocate General's office, an attorney, and there is a Mr. Dikeman, Chief of the Civil Aeronautics Administration Counsel. [207]

Q. Just state what was said.

A. I said I would like to have a clarification. And they explained that they must follow the regulations. Then I brought out for Mr. Heller's and Mr. Davis' use the regulations pertaining to the dismissal of surplus aircraft and the agreement,

(Testimony of George C. Finn.)

Form 65, which they had on the table before them.

And I said, "There is a discrepancy here, gentlemen. The regulations state that a three-year—after three years, as I read it—" told them, "As I read it, after three years the airplane can be disposed of in any fashion whatsoever; but that within three years if they dispose of it without scrapping it, they must get permission from your agency. Now, I would like to know what your position is on this matter."

They said, "Well, we have to conform with the regulations and the agreement."

"Well," I said, "what is the difference then between this agreement and the regulations? They do not coincide and I would like to know why they don't so coincide."

And they said, "Well, we don't—we aren't able to determine that. All we have to go on is what we have here."

And I said, "Now, the Civil Aeronautics Administration will register this airplane to me if I can prove a chain of title under their regulations." [208]

"Now, if I can prove a chain of title under their regulations, would you object to my getting the airplane registered and fly?"

And they said, "We have no control over the actions of the Civil Aeronautics Administration. If they wish to accept your proof of title and give you a registration, that will be acceptable to us. We cannot control their matters."

I said, "Well, I have been showed a policy letter

(Testimony of George C. Finn.)

from the Civil Aeronautics Administration, written by the Federal Security Agency, asking them not to register any of the school aircraft unless they got approval from the Federal Security Agency."

"Now," I said, "let us get this straight. Are you submitting that the Civil Aeronautics Administration can avoid complying with this policy letter, and comply with their regulations as against any other regulations that might exist? Or what do you propose, that the Civil Aeronautics Administration follows the policy letter?"

And they said, "Well, as far as the policy letter is concerned, that is merely a request by us to the Civil Aeronautics Administration."

I said, "Fine. Then I have it understood, gentlemen, that whatever the Civil Aeronautics Administration does in respect to registering this airplane so that I may fly it is dependent upon their regulations proving the title to the [209] plane, is that correct?"

And they said, "That is correct."

Now, I said, "In order to have the title I will need proof of it. And you have in your files a sales receipt document signed by Mr. Bates. Now, the Civil Aeronautics Administration must have the proper chain of title. And I submit to you that this is a sales document transferring the title from the Government War Assets Administration to the Vineland School. This is the document I would like to submit to the Civil Aeronautics Administration toward getting my registration to allow me to fly the plane."

(Testimony of George C. Finn.)

And I told them, "I can buy a scrap airplane and reduce it to its basic material content and have no difficulty at all with any of these restrictions. But if the three years has elapsed, and I have the proper title, I expect to get it registered, under the law, by the Civil Aeronautics Administration."

And they said, "Well, if you can prove that—but you have to have a bill of sale from the Federal Security Agency to the school."

Q. Who said that?

A. The attorneys for Mr. Bradley. They were both there, Mr. Heller and Mr. Davis.

Q. Will you kindly specify, instead of the word "they," who it was, as nearly as you recall? [210]

A. Mr. Heller and Mr. Davis said, "You would have to have a bill of sale."

"Well," I said, "There are documents here that say no formal bill of sale will be issued between the Government and a school, and I assume that to be, that any other document would transfer the title, and I have here a sales receipt——"

Mr. Blackman: Just a moment. For clarity's sake, Mr. Clerk, will you lay before the witness International's Exhibit A, please, consisting of the group of certified copies of documents from the Civil Aeronautics Administration?

Q. (By Mr. Blackman): When you said, "I have here a sales receipt," were you referring to the sales receipt dated July 10, 1946, which is a part of that exhibit?

(Testimony of George C. Finn.)

A. This one signed by Mr. Bates, that is correct.

Q. Very well. And when you referred to a document which said "No formal bill of sale will be issued," do you know what document you were referring to? Anything you have seen in this courtroom?

A. That was a release of custody form, 1316, if I remember correctly, and it stated on those forms, "No formal bill of sale will be issued."

Now, that may have been this particular one, or it may have been another one that they had in their files. I don't know whether this one referred specifically to this case. [211]

Q. Have you seen that document in this courtroom at all?

A. I think Form 1316 here. It may have said it on that, or may have said it on another one.

Mr. Blackman: Do you have such a document?

Mr. Abbott: Yes, I do. I think I know the exact document the witness is referring to, and I can find it in a moment.

Mr. Blackman: Mr. Clerk, will you mark for identification that group of documents, please?

The Clerk: The entire group?

Mr. Blackman: Yes, the entire group.

Mr. Abbott: Can that particular document be detached? The certification includes some copies of documents which are my only copies.

Mr. Blackman: I am willing to have it detached.

The Clerk: Just this one?

(Testimony of George C. Finn.)

Mr. Blackman: Yes.

The Court: Let the document be marked Defendant International Airports' Exhibit—K, is it, Mr. Clerk?

Mr. Blackman: May it be marked Exhibit T, your Honor?

I have other exhibits which have just come up, and I have allocated those other letters to them. It makes no difference, but——

The Court: Exhibit T? [212]

Mr. Blackman: T.

The Court: It may be so marked; Exhibit T for identification.

(The document referred to was marked Defendant International's Exhibit T for identification).

The Court: Do you wish the exhibit placed before the witness?

Mr. Blackman: If the court please.

Q. (By Mr. Blackman): Is that a copy of the document you referred to a moment ago when you referred to a document that said "No formal bill of sale will be issued"?

And you have now had placed before you International's Exhibit T for identification.

A. This is the document—this is form 1316, as I remember it. But it seems to have punched out the top here. If this is a Form 1316,—I believe it is. I believe this is the document which I saw and——

(Testimony of George C. Finn.)

The Court: It appears to you to be that document?

The Witness: It appears to be; yes, sir.

Mr. Blackman: Very well.

The Witness: It seems to. A document, it said something about "No formal bill of sale will be issued." On the document it says, "No certificate of title will be issued."

Q. (By Mr. Blackman): I have asked whether that is a copy of the same document you saw. What is your answer to [213] that, sir?

A. With that slight confusion in wording, I would recognize this as the same document.

Q. In other words, the one that you saw was the same form as that document, but it had the different wording on it that you just now testified to?

A. I believe that is correct.

Q. Very well. With the identification of those documents, Mr. Finn, will you proceed with what else was said in the conversation by anyone on that morning?

A. I said, "Now, gentlemen, the question of the bill of sale is very important to me, or the civil Aeronautics Administration will not register this airplane for flight purposes; unless I can prove ownership. And if no formal bill of sale is going to be issued—" That wasn't part of the conversation, of the certificate of title,—"is it possible that a bill of sale, an informal bill of sale has been issued. We have here in your own files a sales

(Testimony of George C. Finn.)

receipt,"—and I referred to this sales receipt signed by Mr. Bates, Exhibit——

Q. That's International's Exhibit—part of International's Exhibit A for identification. Go ahead.

A. "And from my research in the library this has all the markings, all the requirements of a bill of sale. It says, 'Sales receipt,' and it gives the price, and it shows that money was passed for an item. And as far as I am [214] concerned I consider that this is a sales document for passage of title. Do you consider that a bill of sale?"

Well, they thought for a while, both Mr. Heller and Mr. Davis, and they protested that it didn't say the transfer of title on it, and I agreed with them that it did not. And I asked them, "Now, as attorneys, does this have all the fundamental requirements of a bill of sale?"

And they finally agreed that it did. And I said, "Now, is there any objection to my presenting this, as part of my chain of title, to the Civil Aeronautics Administration so that they can register this airplane?"

And they said, "We have no objection as to what the Civil Aeronautics Administration does."

I said, "Remember the policy letter. Now, I want to know whether or not we are going to follow the law and the regulations, or some kind of family arrangement between two agencies of the Government. And I would like to have it squared away once and for all. And I want to know what the Civil

(Testimony of George C. Finn.)

Aeronautics Administration will do and what you will do."

And they said, "We will not consider any policy letter as affecting any results that the Civil Aeronautics Administration wishes to take; or any action they wish to take."

I said, "Thank you, very much."

Now, to the C.A.A., "What do you propose? Do you propose [215] to follow the policy letter, or do you propose to regulate and grant and acept any evidence I have of title, pursuant to our discussion here?"

And they said, "Well, there is one position that we would like to clear up. That is a condition subsequent." This is Mr. Howard talking, Attorney for the Civil Aeronautics Administration.

"There is a condition subsequent. We recognize that there is a means whereby property can be transferred and title retained in the seller, or transferor, and one of those is a condition subsquent."

"Now, if you will satisfy us as to that point, whether or not we have a condition subsequent, we will determine what action we will take."

And I said, "Fine, Mr. Howard, I will look into that problem."

And then I went back to Mr. Bradley and I said, "Mr. Bradley, there is one thing I would like to clear——"

Q. I am sorry. Is this part of the same conversation?

(Testimony of George C. Finn.)

A. Part of the same. I went back to Mr. Bradley later.

Q. Well, all right. To preserve continuity, was anything else said at the same conversation which you have stated occurred on April 4, 1951?

A. I think that is approximately the sum and substance of it. [216]

Q. Very well. Now, what did you do then?

A. Then I went back to Major Dykman, who allowed me to go to the Army Library. And I studied conditions subsequent for about a week; went through all the cases on the law.

The Court: We don't care about that. You are not a lawyer. Even if you were a lawyer you wouldn't be permitted to express your opinion, because here what the court says is the law; not what some lawyer says. And you aren't even a lawyer.

Q. (By Mr. Blackman): Did you have another conversation then with Mr. Bradley?

A. I went back then to Mr. Bradley.

Q. when was that?

A. And that was—well, after I went to Mr. Bradley, I went back to Mr. Dikeman——

Q. Let's skip Mr. Dikeman.

A. Not Major Dykman—Mr. Howard, the C.A.A. attorney who asked me to look up the conditions subsequent.

Mr. Abbott: I will object to conversations of Mr. Howard where there was not present an agent of the Federal Security Agency.

Mr. Blackman: I haven't asked any question.

(Testimony of George C. Finn.)

The Court: I know, but I will ask you to guide the examination and put your questions very promptly so the witness [217] is not invited to roam around.

Mr. Blackman: All right.

Q. (By Mr. Blackman): I believe the question was, did you have another conversation with Mr. Bradley?

A. Yes, I did. I went back to Mr. Bradley, and it was Mr. Bradley and I in his office. I said "Mr. Bradley, I have gone through the subject of conditions subsequent, and I have been to see Mr. Howard, and he agrees with me that there is no condition subsequent; and that he is willing to register the airplane, and upon the documents which I have submitted.

"Now, I would like to know, for my own information, one more thing. How is it that this agreement Form 65 does not comply with the regulations"?

Mr. Abbott: We are venturing into a field solely obtaining to an opinion of law.

The Court: Where did you find all about conditions subsequent? Did you find a book on it?

The Witness: I went through the Army library, with the help of Major Dykman.

The Court: I would like to know myself where you found it all.

The Witness: I found, not allow condition subsequent unless determined in the deed to the property and so stated in language that it was clear to the court. [218]

(Testimony of George C. Finn.)

The Court: I wish it were that simple. A little learning is a dangerous thing.

Mr. Blackman: We are back now on the conversation you had with Mr. Bradley. Counsel offered an objection. I believe if it is conversation with a representaive of the Federal Security Agency bearing upon this aircraft, it should be admitted.

The Court: It will be admitted. Overruled.

The Witness: I said, "There is something wrong here. Things just don't jibe. The regulation says one thing and the agreement says another. And you have a policy letter with the C.A.A. Please tell me how this regulation was formulated—I mean, this agreement was formulated; where did it originate?"

And he said, "I thought somebody would ask that question some day." And he took out of his drawer this sample copy, this exhibit that somebody asked my brother to look at.

Mr. Blackman: Are you referring to——

The Court: Plaintiff's Exhibit 1.

Mr. Blackman: No, sir, I believe the witness may be referring to this SWPD-35 agreement, Finns' Exhibit B.

May that be laid before the witness?

The Court: Yes.

Q. (By Mr. Blackman): Have you looked at that?

A. Yes, I know of this. [219]

(Testimony of George C. Finn.)

Q. Was that the document that you were referring to in your conversation?

A. This is a copy of the document he took out of his drawer.

Q. Very well. Now, continue, please.

A. And it was on very thin paper, as I recall. And he said—I said, "I would like to know how this agreement was made up."

He said. "I thought someone would ask that question." And he took this out of his——

The Court: By "this," you mean a document, a copy of Defendants Finn Exhibit B?

The Witness: Yes, your Honor.

The Court: For identification.

The Witness: Yes, your Honor.

The Court: Proceed.

The Witness: And he said——

Mr. Charles C. Finn: May I submit that he took out of his drawer the original——

The Court: You are not the witness: If you interrupt again something is going to happen to you. You are just sitting there as a witness and a party.

Q. (By Mr. Blackman): Was your brother present at that conversation?

A. No, sir, just Mr. Bradley and myself. [220]

Q. You tell us what happened, and what was said.

A. He said, "I have here a copy—I mean, the jacket that went to the printer. And this is an old form that was initiated by the RFC, Reconstruc-

(Testimony of George C. Finn.)

tion Finance Corporation, who first had the authority to dispose of these airplanes.

"Now, Reconstruction took over, gave over to War Assets Administration, and when they gave over their authority to War Assets Administration, a new form had to be made. And the new form was copied from the old form. And these crosses and alterations were made on it and was sent to the printer to make up the new form."

Q. By "these crosses and alterations," you are referring to the markings which appear on Finns' Exhibit B for identification?

A. Yes, sir, this circle around Section 101 clause, down to "Legislation."

Q. And by "the old form," you are speaking about the same document, Exhibit B?

A. Yes. This is the old form that was sent to the printer for purposes of printing up the new form.

Q. Very well. And you are holding in your hand Exhibit B. Go ahead.

A. That is right. And they had "out" marked on it and check-marked——

The Court: You weren't asked what the changes were. You [221] were merely asked if there were changes.

Q. (By Mr. Blackman): And the conversation. Please continue.

A. Right. And I said to him, "Is it possible, Mr. Bradley, that the change of this form is what failed to comply with the regulations; that instead of writing a new form according to the new regula-

(Testimony of George C. Finn.)

tion, that copying this old form they brought forward the rescinded regulations requiring the scrapping and mutilation of these ariplanes?"

He said, "That is entirely possible."

I said, "Are we to assume, now, Mr. Bradley, that this whole scrap warranty program is promulgated on administrative error in the making up of the forms copies from an old agreement?"

He said, "Well, Finn, that is just about the size of it." [222]

Well, I said, "Thank you very much. That clears up the last question in my mind regarding the scrapping of these aircraft, and I will go to the CAA."

And I went to the CAA and obtained a registration.

Q. All right. Before you tell us about that, did you have any further conversations with Mr. Bradley?

A. Oh, yes. I said, "I would like to have a copy of that jacket, that I have to leave town immediately, and can you do it for me right away?"

He said, "I will have it for you within an hour." And he sent it down to have it printed.

When I came back I asked him if it was ready. He said, "Yes, it was ready," and he gave it to me.

Mr. Blackman: All right. International offers Defendants' Finn Exhibits B, for identification, in evidence at this time.

Mr. Abbott: To which we object, your Honor.

(Testimony of George C. Finn.)

Even assuming this occurred, it is wholly irrelevant and immaterial.

Mr. Blackman: I object to counsel's statement, "even assuming this occurred." This witness is testifying, and he is under oath. Is counsel assuming this witness is lying?

The Court: That is an improper statement to make at this time. You may reserve any comments on the witness' testimony until the argument. The jury will disregard counsel's comment. [223]

The objection is overruled, and the defendants Finn Exhibit B, for identification, is received in evidence as an exhibit on behalf of the defendant International Airports, Inc.

(The document referred to, marked Defendants Finn Exhibit B for identification, was received in evidence on behalf of Defendant International Airports, Inc.)

Q. (By Mr. Blackman): Mr. Finn, did you have any other conversation, that you can recall, with Mr. Bradley or anyone else at Federal Security Agency at approximately that time?

A. No, sir.

Q. During the course of the last conversation to which you testified, did you say anything to Mr. Bradley to the effect that CAA was going to register the airplane for you? A. Yes, I did.

Q. What did you say in that connection, please?

A. The CAA would register the airplane, because they agreed there was no condition subsequent

(Testimony of George C. Finn.)

and no title—I mean, the title had passed and would not revert.

Q. You said that to Mr. Bradley?

A. That is right.

Q. All right. Tell us what you did next, then, in connection with this airplane.

A. I went to the CAA and got the registration, and submitted these documents as proof of [224] title.

Mr. Abbott: Your honor, we object to this last answer. The registration by CAA is wholly immaterial.

The Witness: Your Honor, the registration is for flying.

The Court: You are a witness. You are not to participate. You and your brother said you are not participating in this trial. Do you recall that?

The Witness: Yes.

The Court: That is the reason I cut you short. Whenever you want to participate, however, you may do so. But having announced your intention time and time again not to participate as parties, I shall not hear you except as witnesses until you change your mind.

The Witness: Your Honor, we would like to participate——

The Court: As parties?

The Witness: ——but we would like to have a regular jury arrangement.

The Court: All right. I have heard all I want to hear about that.

(Testimony of George C. Finn.)

The Witness: It isn't that we don't want to participate. We are anxious to.

The Court: Do you understand the English language?

The Witness: Yes, sir.

The Court: I don't want to hear any more about the jury.

Mr. Blackman: Miss Reporter, was there a question? I am sorry, but I lost the continuity. [225]

(The record was read.)

The Court: The Government's objection is overruled.

Q. (By Mr. Blackman): Now, Mr. Clerk, will you lay before the witness—perhaps he already has it—International's Exhibit A, for identification. Do you have that, the group of photostatic copies from the CAA? A. Right; Exhibit A.

Q. Yes. When you say you submitted these documents, what documents do you refer to?

A. I submitted the sales receipt.

Q. Which is dated July 10, 1946, which is a part of that exhibit? A. That is right.

Q. What else?

The Court: That exhibit is International Airports' Exhibit A?

Mr. Blackman: Yes, sir.

The Court: What else did you submit at that time?

The Witness: I submitted the affidavit of Peter Bancroft.

(Testimony of George C. Finn.)

The Court: Which is also a part of International Airports' Exhibit A; is that correct?

The Witness: That is correct, your Honor.

The Court: What next, if anything, did you submit to the Civil Aeronautics Administration at that time? [226]

The Witness: I submitted a letter from the files of the Archives of the General Services Administration, which stated that aircraft——

The Court: No. Just a moment. Where is the letter?

The Witness: That is in my file, your Honor.

The Court: Is it marked as an exhibit here?

The Witness: Yes, your Honor. I don't know that it is marked. It is in the file, which is the complete file of the Civil Aeronautics Administration.

The Court: Where is the copy of it?

The Witness: It is in the exhibits.

The Court: Here?

The Witness: Yes, your Honor. I can find it.

The Court: Suppose you find it.

The Witness: I don't know that it is marked as a specific exhibit, but it is in that group of papers.

The Court: Very well. You may find it. Step down. You may find the exhibit.

The Witness: Your Honor, I marked several items in here.

The Court: What is "here" now? Exhibit what?

The Witness: In this whole group?

(Testimony of George C. Finn.)

The Court: Exhibit what?

The Witness: It is Exhibit K and K-1.

The Court: All right. Where is the letter in there?

The Witness: Oh, this is marked as K-1. [227]

The Court: The letter to which you have been referring is defendants Finn Exhibit K-1; is that correct?

The Witness: Yes, your Honor.

The Court: According to my notation here, that is a handwritten statement from W. P. Howard. At least, that is the way it appears on the list of exhibits filed October 27, 1954. Will you state what it is?

The Witness: Pardon me. That is my fault. K-1 is my marking. The clerk's marking is Exhibit K-1.

The Court: Which is which?

The Witness: K-1 is the first.

The Clerk: K-1 is dated April 16th.

The Court: K-1-3, is it?

The Clerk: K-1-3, for identification.

The Witness: That General Services Administration letter?

The Court: K-1-3 is the identification. You refer to a letter dated April 16, 1951, to the, or, from the Federal Records Center, General Services Administration, to the Records Branch of the Civil Aeronautics Authority? Is that what you refer to?

The Witnesss: Yes, your Honor.

The Court: Is that agreed, gentlemen?

Mr. Blackman: Yes, your Honor, it is agreed. Your Honor, may I see that letter for a moment?

(Testimony of George C. Finn.)

The Court: Yes, that letter being defendants Finn [228] Exhibit K-1-3, for identification.

Is that K-1-3, Mr. Clerk, or just simply K-3?

The Clerk: Your Honor, I have it marked as K-1. As I understood it, there were only the two, K and K-1, offered by the defendants Finn. In this list it goes clear up to 21, inclusive.

The Court: Apparently, this letter in question is the third document in the exhibit, is it?

The Witness: It is, your Honor.

The Court: Let it be marked K-3, and not K-1-3.

The Clerk: No, that is not the third one in the exhibit.

The Witness: Well, this (indicating) is an index.

The Clerk: This is the fourth one, isn't it?

The Witness: Yes.

The Clerk: It is the fourth document.

The Court: What has heretofore been marked, Mr. Clerk?

The Clerk: K is marked here.

The Court: What is K? K is the entire exhibit, is it not?

The Clerk: No, it is just this one. It is an affidavit with a handwritten letter, and then an affidavit of Peter A. Bancroft.

The Court: What is the handwritten letter marked?

The Clerk: That is by W. P. Howard.

The Court: Is that marked? [229]

(Testimony of George C. Finn.)

The Clerk: That is K.

The Court: That is Exhibit K?

The Clerk: And K-1 is a letter.

The Court: Let that be marked K-1, the handwritten statement be K-1; the affidavit of Peter A. Bancroft will be K-2, that is, the affidavit of Peter A. Bancroft dated April 14, 1951.

The Clerk: Yes, your Honor.

The Court: And then this letter concerning which the witness has just testified will be marked K-3.

The Clerk: Yes. That is dated April 16, 1951.

The Court: It will be so marked.

(The document referred to was marked Defendants' Finn Exhibit K-1, K-2, and K-3 for identification.)

You may now proceed, Mr. Blackman.

The Witness: Pardon me. I submitted this letter——

The Court: This letter being Exhibit K-3?

The Witness: Yes, your Honor—to correct the affidavit by Peter Bancroft, which had——

The Court: Which is Exhibit K-2?

The Witness: ——which is Exhibit K-2, where the numbers on the aircraft were 42-23645, and after a search of the records they submitted this letter to show that 42-3645 and 42-23645 were one and the same airplane. This I had to do to prove the chain of title, to show there was no discrepancy as [230] to the airplane which is mentioned in the

(Testimony of George C. Finn.)

documents, and that is how I found this Sales Receipt by the General Services Administration.

The Court: Which is what exhibit? Is that Airports' exhibit T?

The Witness: That is the blue card that we requested.

The Court: That has not been marked?

The Witness: Has not arrived, no, your Honor.

It was in the search to determine the validity of the numbers of the plane that they uncovered the blue card, the historical record of the plane, upon which they based the writing of this letter.

The Court: Who is "they"?

The Witness: The General Services Administration wrote this letter to the Civil Aeronautics Administration to identify the airplane.

The Court: This letter being Exhibit K-3?

The Witness: Yes, sir, based upon the blue card, which was marked, "Sold to Vineland School."

The Court: Put your next question.

Q. (By Mr. Blackman): Were you at the General Services Building at the time the search was made to determine the numbers?

A. Pardon?

The Court: Is this material? [231]

Mr. Blackman: I wanted to get to the blue card. There has been some testimony about a blue card. The Government hasn't produced it, and I think we are entitled to put in secondary evidence, as the witness saw it.

(Testimony of George C. Finn.)

Mr. Abbott: That is an unfair statement. Counsel knows that the Government has an affidavit stating that a thorough search has been made.

Mr. Blackman: I have never seen it.

Mr. Abbott: I have it.

The Court: Gentlemen, you know you will be in contempt if you continue with that. In the noon recess I want each of you to read what is on the counsel table, on the boards there. And if you haven't read it, don't come into this court again until you have, and don't be guilty of that again.

Mr. Blackman: I apologize to the court.

Mr. Abbott: As do I, your Honor. May I tender the affidavit?

The Court: And no more comments upon matters of that sort by either of you.

Mr. Blackman: May I proceed, your Honor?

The Court: You may.

Q. (By Mr. Blackman): Mr. Finn, were you at General Services Administration Building at the time the search was made to determine the numbers of this aircraft?

A. I was at the General Services Administration [232] Archives Building in Alexandria, and made the search with the custodian of Records.

Q. Now, you have spoken about a blue card. Will you describe the card? Did you see such a card? A. Yes, sir, I did.

Q. And was it during this time that you were in Washington? A. Yes, sir.

(Testimony of George C. Finn.)

Q. And where did you see it?

A. I saw it in the file section of the Archives, and it had a great many tiers of records, and I believe we were on approximately the fifth floor of this archives building, in a section of the files where all of the aircraft records were kept that were transferred from the Air Force to the War Assets Administration, and when the War Assets Administration went out of business they transferred them to the archives, and they had these files in this particular section, and they were designated, "Historical Records of Aircraft." And in this file the man and I standing right there searched for such a number as 42-23645, and we could not find it. We only found the number 42-3645, and the blue card was about, oh, 8-inches by 3½, with lines on it, and it stated, "42-3645 Historical Record Aircraft," and stamped across the face of it was in large letters "Sold," and "Vineland School District."

Mr. Blackman: May it be stipulated that that is the number [233] of the airplane in suit?

Mr. Abbott: No. 42-3645?

Mr. Blackman: Yes.

Mr. Abbott: So stipulated.

Mr. Blackman: Very well.

The Witness: And upon this card, or from this card I asked this man if he would verify with the CAA by letter that they were one and the same aircraft, so that I could obtain a registration, and I asked him to address the letter to Miss Margaret O'Neil, which he did.

(Testimony of George C. Finn.)

Q. (By Mr. Blackman): And that is the letter, Exhibit K-3, you have referred to?

A. Yes, sir, K-3.

Q. To whom at the CAA did you submit these documents?

A. I submitted them to Mr. Dikeman—pardon—to Mr. Howard.

Q. Mr. W. P. Howard?

A. Mr. W. P. Howard

Q. You have identified him as one of the attorneys at CAA?

A. He is assistant counsel under Mr. Dikeman of the CAA.

Q. And was there anything else required by CAA, as far as you know, before they issued you a registration certificate?

Mr. Abbott: Your Honor, once again I object to the entire line of testimony on the CAA proceedings. A registration [234] of airplane by statute has no bearing upon title.

The Court: The objection to the pending question is sustained. You may ask what happened next.

Mr. Blackman: Thank you, your Honor.

Q. (By Mr. Blackman): What happened next?

A. Well, I presented these documents, and I said, "Now, Mr. Dikeman, have I proved to you the chain of title, and are we satisfied"——

Mr. Abbott: Your Honor, we make the objection that this is a conversation within the Civil Aeronautics Authority, which does not have the power and

(Testimony of George C. Finn.)

does not purport to have the power to effect title to the property.

Mr. Blackman: May I be heard? Your Honor, this line of questioning goes to the affirmative defense of estoppel against the Government. We want to show that the registration certificate was passed upon, satisfying CAA's——

The Court: Do you expect to offer this certificate?

Mr. Blackman: Yes, your Honor.

The Court: Why don't you just offer it? What difference does it make what the witness and Mr. Dikeman talked about?

Mr. Blackman: Actually, I think we can shorten the proceeding by following your Honor's suggestion.

The Court: All right.

Q. (By Mr. Blackman): Mr. Finn, do you have before you International's Exhibit A, for identification, a group of [235] certified copies from CAA?

A. Yes, sir.

Q. Will you turn to a photostatic copy of a certificate of registration on aircraft in N111H, dated April 16, 1951? A. Yes, sir.

Q. Is that a photostatic copy of the certificate of registration issued by CAA to you at that time?

Mr. Abbott: To which we object, your Honor. Whether or not a certificate was issued is wholly immaterial. The certificate would prove nationality, and nothing else. Nationality is not an issue here.

The Court: Overruled.

(Testimony of George C. Finn.)

The Witness: I can't see that word "Certificate of Registration." There are two forms that are filled out. One is "Application for Registration," and the other is "Certificate of Registration," and they are quite similar. If I could take this apart, to see whether that says "Registration Certificate," I would be able to identify it.

The Court: Mr. Clerk, will you assist the witness?

The Witness: I didn't want to destroy the certification.

This says, "Certificate of Registration," and this is a copy of that certificate.

Q. (By Mr. Blackman): Very well. By the way, Mr. Finn, [236] I notice more than one certificate of registration in there, all being to you and your brother, and all relating to the same airplane, or apparently from the same file, the airplane in suit. Can you explain how it happens that there is more than one?

A. When I had the airplane at International in the hangar, the CAA came around and said, "There seems to be some discrepancy on the numbers on your airplane. Did you change any numbers?"

I said, "No, I did not change any numbers." And I gave them the number as the Aircraft Serial No. 1-232.

And they said, "That is not the aircraft serial number on this airplane. Where did you get it?"

I said, "I got this identification from the files in Washington, on documents that were in those files."

(Testimony of George C. Finn.)

And they said, "Well, we think there has been an irregularity here, and we are going to check into it."

I said, "For your information, everything that we have done is on file in Washington with the Registrar of the Civil Aeronautics Administration, and if there is any discrepancy, I will write them a letter and have them correct it."

And so I examined the airplane, and found a serial number on the plane, 2-6678, and I sent a letter to the Civil Aeronautics Administration asking that that number be included with the 42-3645, and 1-232, so that all the markings on the [237] plane will be satisfactory to any of the CAA representatives. And that is why they issued this new certificate, which says, "Letter sent to Washington, D. C., for correction, Charles C. Finn and George C. Finn," and that letter is in the file.

The Court: Would this be a convenient point to interrupt for the noon recess?

Mr. Blackman: Yes, your Honor.

Mr. Abbott: May I tender the affidavit to which I have referred, and which has been previously made available, your Honor?

The Court: Do you offer it in evidence?

Mr. Abbott: I will offer it in evidence as the Government's exhibit next in order, your Honor.

Mr. Blackman: May I ask counsel if he has a copy of it?

Mr. Abbott: I do.

The Court: Is there any objection to the offer?

(Testimony of George C. Finn.)

Mr. Blackman: No objection, your Honor.

Mr. Nelson: No objection.

The Court: Received in evidence as Plaintiff's Exhibit——

The Clerk: 10, your Honor.

(The document referred to, marked Plaintiff's Exhibit No. 10 for identification, was received in evidence.)

The Court: We will take the noon recess at this time, ladies and gentlemen of the jury, until 1:30 this afternoon.

Before we separate, I would again admonish you of your [238] duty not to converse or otherwise communicate among yourselves, or with anyone else, upon any subject touching upon the merits of this trial, and not to form or to express an opinion on the case until it has been finally submitted to you for your verdict.

You are now excused until 1:30 this afternoon.

You may step down.

(Thereupon the jury retired from the courtroom.)

The Court: Recess until 1:30.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 1:30 o'clock p.m., of the same date.) [239]

OCTOBER 28, 1954—1:40 P.M.

The Court: Are there ex parte matters?

The case on trial, let the record show that the jury are present.

Mr. Wallace: If the court please, defendant Seaboard Surety Company wish at this time to waive any and all claims to the aircraft in question and discharge any right, title and interest therein or thereto; and request the court dismiss as to Seaboard Surety Company.

I understand Mr. Abbott will seek authority from Washington to do that with regard to the cost in Seaboard Surety Company and we are willing he should seek this authority and notify the court tomorrow.

Mr. Abbott: Counsel's statement is correct, your Honor. As I understand the position of Seaboard will be made a matter of record here, namely, they disclaim any interest in the aircraft. I will seek authority to dismiss the claim with cost to neither party, and we will move proptly to secure that authority from the Attorney General.

The Court: Very well. The jury will understand then that Seaboard Surety Company no longer claims any interest of any kind in the airplane in suit.

The defendant George C. Finn was on the witness stand, I believe. [240]

GEORGE C. FINN

a witness called on behalf of defendant Vineland Elementary School District, having been previously sworn, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Blackman:

Mr. Clerk, will you lay before the witness Defendant International's Exhibit A for identification, please.

Q. (By Mr. Blackman): Mr. Finn, looking at Defendant International's Exhibit A for identification, I believe before the recess you had identified all of the documents which are a part of that exhibit, is that correct? A. That is correct.

Mr. Blackman: If the court please, International now moves defendant International's Exhibit A in evidence.

Mr. Abbott: May I have a moment to review the list of documents here, your Honor, before tendering an objection?

The Court: You may.

Mr. Abbott: That one document, your Honor, actually consists of a number of separate instruments. We object to certain portions, as follows: the original and duplicate of certificate of registration, N-111H, April 16, 1951; duplicate copy of corrected certificate of registration N-111H, issued June 18, 1952. [241]

We object to them on the grounds that the cer-

(Testimony of George C. Finn.)

tificate of registration has no force or effect, is not a declaration of title, simply a declaration of the nationality; and under the regulations promulgated to the C.A.A. Act it is void if title is not in the party who in fact secures registration.

The Court: What is the purpose of the offer?

Mr. Blackman: The purpose of the offer, your Honor, is to show that the registration certificate was issued by the Administrator of C.A.A., based upon the knowledge of sale of the aircraft to Vineland School District and the resale by Vineland to the Finns; and based upon the conferences which the witness has testified occurred over at the Federal Security Agency; that certificate of registration was the same certificate that was shown to International Airports later on, as its testimony will develop.

The Court: Well, the objection is overruled, and International Airports' Exhibit A for identification is now received in evidence.

(The document referred to, and marked International Airports' Exhibit A, was received in evidence.)

Mr. Abbott: May we make the limiting objection, your Honor, that it is received—that is, the document objected to is received solely for the purpose of showing what representation and what documents were displayed to International, and not as any evidence of title? [242]

(Testimony of George C. Finn.)

The Court: Well, the sales receipt might be in an entirely different category.

Mr. Abbott: I do not interpose an objection to that document, your Honor. [243]

Mr. Blackman: Your Honor, may I be heard on that?

The Court: The exhibit is received without limitation.

(The document referred to, marked Defendant International's Exhibit A, was received in evidence.)

Mr. Blackman: Mr. Clerk, will you lay before the witness Finns' Exhibit E, please?

(The document referred to was handed to the witness.)

Q. (By Mr. Blackman): Have you examined that document? A. Yes, sir.

Q. Where did you first see it?

A. I first saw this document in Washington in the files of Mr. Bradley at the Federal Security Agency's office.

Q. Now, did you see that document in the original or in the photostatic copy form which it now appears to be?

A. I saw it in the original.

Q. How did you obtain the photostatic copy?

A. I typed a copy of the original, and this is a photostat of the paper that I typed. Mr. Bradley gave me a typewriter and said, "Well, we can't remove these files from the office, but if you care to

(Testimony of George C. Finn.)

copy out this information, why, sit right down here." And I did.

Mr. Blackman: If the court please, I believe there has been a stipulation that the document is genuine, and we will offer it in evidence at this time.

The Court: The offer is what? What [244] exhibit?

Mr. Blackman: Finns' Exhibit E, the photostatic copy of a teletype, dated July 10, 1946, from Heddleston, Regional Director, to Chief, Fiscal Branch.

The Court: Is there objection?

Mr. Abbott: No objection, your Honor.

Mr. Nelson: No objection, your Honor.

The Court: Received in evidence.

(The document referred to, marked Defendants Finn Exhibit E, was received in evidence.)

Mr. Blackman: May I proceed, your Honor?

The Court: Yes, you may.

Q. (By Mr. Blackman): Mr. Finn, have you told me about all the conversations that you had with Mr. Bradley at Federal Security Agency before you left Washington on this trip which you made in April, 1951?

A. I testified that all of those—that that was all I could recall, and I have recalled in the meantime that we discussed also this particular document. And I asked him——

(Testimony of George C. Finn.)

Q. Referring now to Finns' Exhibit E?

A. Yes.

Q. Very well. What did you discuss in connection with that document?

A. Well, that came up in respect to the question on this sales receipt, as to whether or not it constituted a bill of sale upon which registration could be granted. [245]

And they said, "Well, this is a sales receipt, all right, but what about the airplane? No marking there as to the identity of this sales receipt for any transaction."

And I pointed out this letter that they had in their file, which stated that on July the 10th, '46, the War Assets had received money from the Vineland Elementary School District, and I pointed out to them that there was even the check number in this letter, a certified check number, and the amount was $300, which corresponded exactly with the amount of money on the sales receipt; and that I would further verify this when I returned to California, and even look up the check, which was in the Bank of America in Los Angeles.

So I established with them that this sales receipt was the sales receipt in reference to this airplane, designating this check number.

Q. Does the number of the airplane appear on that document, Finns' Exhibit E?

A. It does. It appears here as 42-3645 in this document.

Q. Very well. Now, have you told me everything

(Testimony of George C. Finn.)

that was the subject of discussion between you and Mr. Bradley during that visit to Washington?

A. As near as I recall, Mr. Blackman, that is the sum and substance. If anything comes up later, I will notify you.

Q. Did you have any conversations with anybody at [246] General Services Administration, other than what you have testified to this morning, in connection with looking up the number on the airplane?

A. Anyone in the General Services Administration?

Q. Yes.

A. At this time, in connection with this?

Q. During this trip.

A. No, sir. I contacted the Federal Security Agency and the archives of the General Services Administration. Those are the offices that I went to.

Q. As a result of that contact with General Services Administration, you state that the letter, K-3—I believe it has been identified as K-3—was written to CAA? A. That is right.

Q. Now, when did you return to California following that trip?

A. It was about six weeks later. I spent some time in New York and then came back to California.

Q. Did you do anything in connection with this airplane following that?

A. Upon my return?

Q. Yes.

(Testimony of George C. Finn.)

A. I attempted to—well, what I did was show the registration to Mr. Bancroft, and told him that my trip had been successful in Washington, that I had secured the proper [247] releases that were necessary to fly the airplane, and that I had a registration certificate on it which would allow me to fly it, and that if I didn't have that registration certificate I would not be able to fly it. And I emphasized that fact to him, as granting the proper clearances so that the airplane could be flown, because there was only one question between us, as to whether or not we could fly this airplane.

And I said, "Here is my evidence, and based upon this and my conversations in Washington, I have been granted the permission to register this airplane as the owner, and, therefore, I can fly it."

Q. Did you have access to the airplane after you came back to California?

A. Yes, sir, we had access outside of school hours.

Q. I see. Then were you in the airplane outside of school hours during that period following your return from the East?

A. Yes, we went through it and planned out what we would have to do to it to get it in flyable shape and to be able to use it.

We wanted to start our own airplane business, and we were very anxious to get this airplane in the air, so we spent all of our spare time outside of school hours planning our use of this airplane.

Q. Now, when did you first start any work on the [248] airplane?

(Testimony of George C. Finn.)

A. It was approximately September of 1951.

Q. But you had planned it out before that?

A. We had inspected the fuel system and we had gone over the airplane to see just what parts were required, and we were picking up parts wherever we could find them during that interim until we could get ready to rehabilitate this airplane.

Q. Did you make out a list of the specifications that the airplane required?

A. Well, we had—there was a list that we went by for putting it in top flying shape, which was designated by the Civil Aeronautics Administration. We went through that list as a further necessary requirement, and then we knew from our own experience, in just examining the plane, that we were going to have to change the carburetors and the plugs, and these engines had not run, and we were going to have to do a lot of work to get this airplane in shape. It was sunk in the ground, with the tires deflated and worn and rotted and unusable, and we knew we were going to have to take all the rusted and deteriorated parts off and replace them, because the CAA would not let us fly it until it reached a certain technical requirement.

Q. In making the examination, were you in and about the airplane for some time before you came to Burbank, Mr. [249] Finn? A. Yes, sir.

Q. For what period were you in and about the airplane to make that determination?

A. From approximately May of 1951, until we flew the airplane off in October, 1951.

(Testimony of George C. Finn.)

Q. When did you first come into Burbank with the idea of furthering your stated objectives?

A. With the airplane?

Q. I don't mean when did you fly the airplane in. When did you come in, in advance of the airplane, with the idea of lining up people to do the work for you?

A. Oh, that was approximately in May, in June and July. We were doing these things simultaneously. We were trying to obtain the facilities for repairing the airplane and putting it in top shape, as well as examining it and picking up parts, and we did these things together.

We inquired through various companies if they would repair it and under what terms and conditions they would repair it, and everybody we went to had different ideas. [250]

Q. Did you try and get bids on the work that you wanted to have done?

A. Yes, sir. We went to the various places, Southern California Aviation; went to Potter's. We went to Flying Tigers. We went to International. We went to Intercontinental Airways.

Q. Well, at that point, Mr. Finn, you didn't know who was going to do the work, is that right?

A. That is right.

Q. And you say you went to the Flying Tiger Line as one of the companies that you thought might be interested? A. Yes, sir.

Q. You spoke to Mr. Duly out there?

A. That is right.

(Testimony of George C. Finn.)

Q. Then you had some negotiations with Mr. George Batchelor, who is sitting here in the courtroom? A. Yes, sir.

Q. And you had those negotiations which led up to the signing of certain documents by International Airports and the Finns, is that correct?

A. Pardon? Do I have——

Q. I said you had—— A. Yes, sir.

Mr. Blackman: Very well. Now, Mr. Clerk, will you lay before the witness International's Exhibits B, C—— [251]

The Clerk: B and C?

Mr. Blackman: I will give you a list. B, C, E, F, G, H, I. I think we can stop there.

Will you examine those, please?

Mr. Abbott: During this period I might advise the court that, as ordered, we have requested Mr. Duly be present, and he is here available for such examination as may be required.

The Court: Very well.

Do you wish to recall Mr. Duly? Was it you, Mr. Blackman, or Mr. Nelson?

Mr. Blackman: I think it was Mr. Nelson.

The Court: You wish to recall him?

Mr. Nelson: Yes, I do.

The Court: While the witness is examining all these documents, he may step down from the stand and make the examination off the stand. And Mr. Duly may be recalled.

You may step down.

(Witness temporarily excused.)

DOUGLAS DULY

a witness called on behalf of defendant Vineland Elementary School District, having been previously sworn, was recalled and testified as follows:

The Clerk: You are Mr. Douglas Duly?

The Witness: Yes. [252]

The Court: Mr. Blackman, it might save time, while this testimony is going on, if you have any other documents for the witness to examine, give them to him and have him examine them now.

Mr. Nelson: May I proceed, your Honor?

The Court: You have been sworn.

You may proceed.

Direct Examination

By Mr. Nelson:

Q. Mr. Duly, you recall yesterday you mentioned a conversation with one of the defendants Finn when they came to your establishment seeking to have the Flying Tigers do some work on the subject aircraft? A. I do.

Q. Can you give us an approximate time that that conversation took place? By that, I mean——

A. Summer of '51.

Q. Was that the only conversation that you had with the defendants Finn concerning the subject plane? A. Yes.

Q. Do you recall in that conversation making a statement to the defendants Finn concerning the value of the aircraft?

A. No discussion was made. [253]

(Testimony of Douglas Duly.)

Q. Do you recall making any statement whatsoever to the defendants Finn concerning what you think they should do with the aircraft?

A. No. We didn't discuss that point.

Q. Did you make a statement to one of the defendants Finn during that conversation that it was your opinion that the plane should be covered with gasoline and burned? A. No, I did not.

Mr. Nelson: No further questions, your Honor.

Mr. Abbott: No cross-examination, your Honor.

The Court: Did you call his attention to the time and place of it?

Mr. Nelson: Yes, I did, your Honor. He said the summer of '51.

I might ask one further question:

Q. (By Mr. Nelson): Where did this conversation occur?

A. This conversation never occurred.

Q. Where did this conversation between you and the Finns concerning this maintenance work occur?

A. In my office at the Lockheed Air Terminal.

Q. And you did not have any conversations with defendants Finn at any other place, apparently?

A. No. When they left my office I didn't see them again.

Mr. Nelson: Thank you. [254]

The Court: Did you say anything in substance or effect of what counsel has just asked you?

The Witness: Absolutely not.

The Court: Nothing like that ever occurred?

The Witness: Absolutely not.

(Testimony of Douglas Duly.)

The Court: No such subject was mentioned, as pouring gasoline on the plane and burning it?

The Witness: Absolutely not.

The Court: Anything further?

Mr. Nelson: No. The witness may be excused. And if I may continue this, I will call the two Finns.

The Court: Yes. I suggest you remain in attendance, Mr. Duly.

Mr. Blackman: Before he leaves, may I ask him a question?

The Court: Yes, you may.

Cross-Examination

By Mr. Blackman:

Q. Mr. Duly, do you at the present time have any matters pending with the United States Government, with the United States Attorney's office here?

A. No.

Q. The Flying Tiger Line, that you know of?

A. No.

The Court: Do you have any interest, direct or indirect, [255] that you know of, in the outcome of this lawsuit?

The Witness: Aboslutely no, sir.

Q. (By Mr. Blackman): Were you paid as an expert witness to appear here?

A. I have been requested to furnish my opinions on airplane value.

(Testimony of Douglas Duly.)

Q. Did you furnish a bill?

A. No bill was——

Q. I asked you have you been paid or promised anything as an expert witness?

A. I will bill for my services.

Q. You will bill for your services?

A. Yes.

The Court: Bill whom?

The Witness: The United States Government.

The Court: Anything further?

Mr. Blackman: Nothing further.

Q. (By Mr. Abbott): Mr. Duly, remain on the stand a moment, please.

What was the agreed rate of compensation for your services to be performed as an expert witness in this case? A. $35 a day.

Q. What is your salary as an employee of the Flying Tiger Line in terms of dollars per day?

A. I am on a fixed based salary, plus commission. It [256] averages out—business is good, it goes up—averages out about $800 a month.

Q. And have arrangements been made with your superiors to compensate the company for your loss of time at a rate of $35 a day, as equivalent for that loss of time? A. It has.

Mr. Abbott: No further questions.

Mr. Nelson: No further questions. If we may clear this up so Mr. Duly can leave, I will call the two Finns.

The Court: Remain in attendance until you are excused.

Mr. Nelson: May I call Mr. George Finn at this time?

The Court: George Finn will resume the stand.

GEORGE C. FINN

called as a witness on behalf of defendant Vineland Elementary School District, having been previously sworn, was recalled and testified further as follows:

Direct Examination
(Continued)

By Mr. Nelson:

Q. Mr. Finn, calling your attention to the meeting with Mr. Duly, which we have just covered, did that meeting take place approximately—what date did it approximately take place?

A. Well, my recollection was sometime in May or early [257] June, 1951. And there were several meetings.

Q. You mean there was more than one meeting on this general conversation of whether or not their company would do work on this aircraft?

A. There were many of them. We were discouraged many times from doing this. The company took the view that—or, Mr. Duly took the view, they questioned whether or not we owned this airplane; that they had tried to buy it, and they were unable to buy it from Vineland School District—"How did you get it?"

We said, "We bought it and we have the registration on it. And we want to bring it in here, or

(Testimony of George C. Finn.)

somewhere where it can be brought up to the requirements, and we would like to know whether it can be done on the basis of credit or how we can make these arrangements." And we were not getting anywhere with them. They didn't go along with our thinking on the matter. And we were in the hangar one day and Mr. Duly said, "Well now, look, you might just as well pour some gasoline on that thing and burn it up, if you want my advice."

We said, "We don't want your advice on that, Mr. Duly." And we just left. That was probably our last meeting with Flying Tigers, because we felt pretty much discouraged about that.

Q. Approximately how many meetings did you have with Mr. Duly in this connection? [258]

A. Five or six.

Mr. Nelson: I have no further questions.

Cross-Examination
(Continued)

By Mr. Abbott:

Q. Mr. Finn, did you have with you, when you talked with Mr. Duly on any occasion, pictures of the airplane in suit? A. No, sir.

Q. You did have pictures with you when you talked with Mr. Batchelor of International that same summer, did you not?

A. I didn't have them with me, I don't believe, no. No. We had many conversations, and finally Mr. Batchelor asked for identification on this par-

(Testimony of George C. Finn.)

ticular plane, and it was at a subsequent date, after negotiations, that we showed him the pictures.

Q. Well, did you show the pictures to Mr. Batchelor before or after you signed these various instruments dated August 31, 1951, which have been displayed to you by counsel?

A. I believe it was after. He knew the airplane. He told me he was up at the school a couple of years or so, or a year or so before that, he went swimming up there. And he had seen the airplane at that time. So we were both talking about the same airplane, and wasn't a necessity to give him any exact identification other than the registration. [259]

Q. Now, were your conversations with Mr. Batchelor within the same two or three-month period as your conversations with Mr. Duly?

A. No. They were later. I didn't contact Mr. Batchelor until approximately September. We had no contact at all with him up to that point. It was Southern California Aviation and Potter. And there are a group of aviation repair maintenance places around Lockheed Air Terminal, and we were shopping with all of them. We had just got out of the service, and we didn't know the necessary steps to take to get into the airline business. And we just kept asking and asking and asking, and everybody we went to had a different answer and a different approach, and we tried to melt them all together to get our airplane flying.

(Testimony of George C. Finn.)

Q. In any event, you first met Mr. Batchelor in September, 1951, Mr. Finn?

A. I believe it was around that time.

Q. Now, counsel has just shown to you Defendant International's Exhibit B, an aircraft chattel mortgage; C, a note secured by a chattel mortgage; E, agreement, and each of which bears the date August 31, 1951.

A. That is approximately September.

Q. Had you talked with Mr. Batchelor before you signed those instruments, Mr. Finn?

A. Yes. [260]

Q. How long before?

A. Oh, about a week. He operated much faster than anybody else we ever talked to, and, in fact, it was quite a nice arrangement. We were very happy we discovered this man. And we went right ahead with our——

Q. How long was it after you talked with Mr. Duly that you talked with Mr. Batchelor?

A. Oh, approximately two months; June, July, August—about two months and a half.

Q. And did you do any work on the aircraft in suit during that interval?

A. Nothing more than the inspection and establishing the technical requirement to put the plane in shape. We were on the plane—we were not in a position to work on the plane while it was still subject to the school's use.

Q. You didn't do any work during that period on the aircraft, is that so?

(Testimony of George C. Finn.)

A. Only minor inspections; no changes.

Q. Now, Mr. Finn, is it true that in August, 1951, Mr. Batchelor offered you $50,000 for the airplane, and you refused it? A. In August, yes, sir.

Mr. Abbott: No further questions on this point.

We will want to cross-examine the witness as to his other testimony. We could do so now, or later, if the court please. [261]

The Witness: Pardon. I would like to correct that amount. My impression is $55,000. And we refused.

The Court: Mr. Batchelor offered to buy it from you?

The Witness: Yes, sir.

The Court: That is, Mr. Batchelor of International Airports?

The Witness: Yes, sir.

The Court: $55,000?

The Witness: Yes, sir. That is my impression of the arrangement and negotiations.

The Court: Does that conclude the Government's examination on this phase——

Mr. Abbott: On the phase——

The Court: ——relating to the conversation with the witness Duly?

Mr. Abbott: It does, your Honor.

The Court: Any further questions on this aspect of it?

Mr. Nelson: Was your brother also present at those conversations?

(Testimony of George C. Finn.)

The Witness: Yes, sir.

The Court: That is the conversation with Mr. Duly?

Mr. Nelson: With Mr. Duly, yes, sir.

Would the Government be willing to stipulate the other brother Finn would testify to the same matter Mr. George C. Finn has testified to? [262]

Mr. Abbott: I cannot so stipulate.

Mr. Nelson: We will call Mr. Charles Finn.

The Court: Very well. You may step down.

(Witness excused.)

The Court: Mr. Charles Finn, take the stand.

CHARLES C. FINN,

a witness called on behalf of defendant Vineland Elementary School District, having been previously sworn, was recalled and testified as follows:

The Court: Have you heretofore been sworn upon the trial?

The Witness: Yes, your Honor.

The Court: Proceed.

Direct Examination

By Mr. Nelson:

Q. Mr. Finn, You have been present and heard the testimony of Mr. Duly here today, and also the testimony of your brother. Were you present at the time that you discussed this subject aircraft with Mr. Duly, and particularly for the purpose of

(Testimony of Charles C. Finn.)

attempting to get their organization to do work on the plane? A. Yes, sir.

Q. Approximately when did those conversations take [263] place?

A. Well, they were between the period of May and August.

Q. About how many conversations occurred?

A. Four or five.

Q. Were you present at the conversation referred to by your brother as having taken place in the hangar at Flying Tigers wherein this statement came out as to what you should do with the plane?

A. Yes, sir.

Q. And what was that statement?

A. The statement was that, "My advice is for you to throw gasoline on it and burn it up."

Mr. Nelson: I have no further questions.

Cross-Examination

By Mr. Abbott:

Q. Mr. Finn, in the course of that conversation you have last described, were you and your brother and Mr. Duly discussing the value of the airplane in suit?

A. We were attempting to negotiate for the repair of the airplane, which was a considerable amount, and Flying Tigers apparently didn't want to negotiate with us on that plane at all. And in the course of the conversation, Mr. Duly said that, "The best thing for you to do with that [264] airplane is throw gasoline on it and burn it up."

(Testimony of Charles C. Finn.)

Q. Now, immediately prior to his making the statement you described, you asked him on his opinion for value of the aircraft?

A. I don't recall as I did.

Q. Isn't it a fact, Mr. Finn, that what you were discussing immediately prior to that statement you have described was your relationship with the Vineland School District and title to the aircraft and Government restrictions on the aircraft?

A. I don't know as that was a fact in that particular conversation.

Q. What is it that you said that caused him to make the statement relating to throwing gasoline on the aircraft?

A. We had been attempting all the time to get the airplane repaired. We didn't know actually the value of the plane ourselves, and it was very possible that we bought a "white elephant."

So as we went around to these other aircraft people to see what we could do about it, about putting the airplane in shape, and flying it, we have got these answers, and it is our belief that we may have bought the plane that they wanted, and seems to appear that there was a shut-down on it; that the Tigers or Slick would not repair the airplane; perhaps that they might be able to purchase it later from us. [265] We felt there was a stop on it, that they would not negotiate with us for the repair of this plane. [266]

Q. You felt there was some conspiracy in the

(Testimony of Charles C. Finn.)

industry which would prevent you from getting the airplane repaired, Mr. Finn?

A. No, sir, I didn't feel that at all. I felt that we did not know the value of the airplane. We asked the people what the value of the airplane was, and these were the answers that we got.

Q. Then was it in reply to a question relating to value that Mr. Duly said that which you have said he said relative to throwing gasoline on the airplane?

A. I can't say definitely that I asked him for the value and that he replied in that fashion. I just recall the statement that we throw gasoline on the airplane and burn it up.

Q. Within two months after that did Mr. Batchelor offer you $55,000 for the aircraft, and did you refuse that offer?

A. Yes, within approximately that period, and we refused Mr. Batchelor's offer.

Mr. Abbott: No further questions.

The Court: Any further questions on this phase?

Mr. Nelson: No further questions.

The Court: You may step down.

Is there any occasion to require further attendance from Mr. Duly? [267]

Mr. Abbott: Your Honor, we request that he be excused.

The Court: You are excused.

Mr. Duly: I would like to clear a matter up here.

Mr. Abbott: May Mr. Duly resume the stand?

The Court: Resume the stand, Mr. Duly.

DOUGLAS DULY,

recalled as a witness on behalf of the Government, having been previously duly sworn, testified further as follows:

Direct Examination

The Court: Is this an explanation you wish to make?

The Witness: Yes. This is so hideous that I think it requires a little more time.

The Court: No comments on it. You may merely testify——

The Witness: As I testified, I am on salary and commission. A customer comes to me with an airplane——

The Court: Not what happens in usual cases. What happened in this case.

The Witness: Well, in this case, I never made that statement, and I would like to bring out why it would be impossible for me to make that statement.

The Court: That is a matter of argument, Mr. Duly.

The Witness: Regarding our company working on that airplane, some thought was given, but when credit was requested, we did not feel that we should. I can take pride in saying [268] that our company is not considered as a fast operator, and therefore, we neglected—we decided not to pursue it and work on this airplane further.

Q. (By Mr. Abbott): Well, do you have any-

(Testimony of Douglas Duly.)

thing further to bring out relative to your conversations with the two defendants Finn, Mr. Duly?

A. There was no such statement made.

Q. And did you have but one conversation with them? A. Regarding this airplane, yes.

Mr. Blackman: No further questions, your Honor.

The Court: Did either of the defendants Finn inquire of you your opinion as to the value of the plane at that time?

The Witness: No.

Mr. Blackman: Your Honor, while the witness is on the stand, may I ask him a couple of questions relative to another matter we asked him about earlier?

The Court: First, is there anything further on this subject?

Mr. Nelson: No further questions.

Cross-Examination

By Mr. Blackman:

Q. Mr. Duly, I believe you had other matters pending with the United States Attorney's office; is that right?

A. Nothing but what I discussed now.

Q. Pardon me? [269]

A. Nothing except what I discussed previously.

Q. Well, didn't you have a conversation with Mr. Batchelor, where you told him that you did have another matter with Mr. Abbott, and that is how he happened to contact you?

(Testimony of Douglas Duly.)

A. No. Regarding anything pertaining to this, no.

Q. How did Mr. Abbott happen to contact you?

A. I believe it was Mr. Miller—was it?—from Frisco. I believe Mr. Miller from the San Francisco office contacted our company, possibly through my superior, Mr. Benniger.

Q. Before that time you had nothing to do, you say, with any member of the United States Attorney's office here locally? A. No.

Q. And had never been down here? A. No.

Mr. Blackman: That is all.

Redirect Examination

By Mr. Abbott:

Q. Is Mr. Miller the regional counsel of the Department of Health, Education and Welfare at San Francisco? A. Yes, he is.

Q. Is he in any way connected with the office of the United States Attorney, if you know?

A. I identify him as legal counsel for—is it General [270] Services?

Q. Health, Education and Welfare.

A. ——Health, Education and Welfare.

Mr. Abbott: No further questions.

Mr. Blackman: That is all.

The Court: You may step down, Mr. Duly, and you are excused from further attendance.

(Witness excused.)

The Court: The defendant George C. Finn will resume the stand.

GEORGE C. FINN

one of the defendants, resumed the stand, and, having been previously duly sworn, testified further as follows:

Cross-Examination
(Continued)

By Mr. Blackman:

Q. Mr. Finn, have you had an opportunity to look at the documents that I called your attention to before this last break? A. I have.

The Court: You mean prior to the time that Mr. Duly took the stand?

Mr. Blackman: Yes, your Honor.

Q. Directing your attention to International's Exhibit B, will you identify that, please? [271]

A. This is a chattel mortgage on aircraft, the aircraft in suit.

Q. That is a chattel mortgage dated August 31, 1951? A. That is right.

Q. And is that signed by yourself?

A. Yes, sir.

Q. And do you recognize your brother's signature thereon? A. Yes, that is his signature.

Mr. Blackman: We will offer Defendant's B in evidence at this time, your Honor.

Mr. Abbott: No objection, your Honor.

The Court: Received in evidence.

(The document referred to, marked Defend-

(Testimony of George C. Finn.)

ant International's Exhibit B, was received in evidence.)

Q. (By Mr. Blackman): Now, was that aircraft chattel mortgage given by you as security for the sum of $15,000?

Mr. Abbott: Objection, your Honor. The document speaks for itself, together with the other documents.

Mr. Blackman: I will accept counsel's statement. I want to shorten the proceedings.

Q. Did you receive $15,000 in cash?

A. Yes, sir.

Q. All right. As a result of that, did you give the chattel mortgage? [272]

A. Yes, sir. Pardon. That was a check

Q. Well, did you cash the check?

A. Yes, sir.

Q. Very well. Defendant International's Exhibit C, will you identify that, please?

A. Exhibit C is a note secured by a chattel mortgage, dated August 31, 1951, a promise to pay to International Airports at Lockheed Air Terminal $15,000.

Q. Did you deliver that to International when you received the check? A. Yes, sir.

Mr. Blackman: I offer Exhibit C in evidence at this time.

Mr. Abbott: No objection, your Honor.

The Court: Received in evidence.

(Testimony of George C. Finn.)

(The document referred to, marked Defendant International's Exhibit C, was received in evidence.)

Q. (By Mr. Blackman): Exhibit E, Mr. Finn, will you look at that? E is the agreement.

The Court: These are all International Airports' exhibits, so designated?

Mr. Blackman: Yes, your Honor.

The Court: Unless otherwise stated?

Mr. Blackman: Yes, your Honor.

The Witness: I don't have E.

The Court: Mr. Clerk, will you assist him? [273]

The Witness: I have D and G.

The Court: Mr. Clerk, do you have International Airports' Exhibit E for identification?

The Clerk: No, I don't have it here, your Honor.

The Witness: I will check again.

The Clerk: I think it was in that group.

The Court: It is attached to the answer, but is there a separate copy of it here? Do you have a separate copy of it?

Mr. Blackman: I don't know whether we offered a separate copy or not. I thought that we did.

The Witness: Your Honor, I think there is a separate copy in our file.

The Court: The witness states that he believes he has a separate copy in his file. Do you wish him to produce it?

Mr. Blackman: Will you step down and get it?

(Testimony of George C. Finn.)

The Witness: Your Honor, that is not here. I have a copy in the briefcase.

Mr. Blackman: We will pass that for the time being, your Honor. I think we can introduce it through Mr. Batchelor.

The Court: The copy attached to the answer to the amended complaint has been marked. You can make use of it, and you may offer it in evidence.

Mr. Blackman: Thank you. We will offer the copy [274] attached to the amended complaint.

The Court: I assume you wish the witness to identify it?

Mr. Blackman: Yes, your Honor, although I believe it has been stipulated to.

The Court: As I recall, yes.

Mr. Abbott: It has been stipulated to as to genuineness and due execution.

The Court: It is stipulated it is an agreement, dated August 31, 1951, between International Airports and the defendants Finn. Is that correct?

Mr. Abbott: That is right.

The Court: Attached to the answer of International Airports, Inc.; as Exhibit A. It is received in evidence as International Airports' Exhibit E here.

(The document referred to, marked Defendant International's Exhibit E, was received in evidence.)

Q. (By Mr. Blackman): Will you look at Exhibit F, please?

(Testimony of George C. Finn.)

A. Yes, sir.

Q. Will you identify it?

A. This is a canceled check for $15,000, with the heading of "International Airports, Inc., Hangar 2, Lockheed Air Terminal, Burbank, California," dated September 1, 1951.

Q. Very well. You testified you received the proceeds of that check? [275] A. Yes, sir.

Mr. Blackman: We offer it in evidence as International's Exhibit F.

Mr. Abbott: No objection, your Honor.

The Court: Received in evidence.

(The document referred to, marked Defendant International's Exhibit F, was received in evidence.)

Q. (By Mr. Blackman): Exhibit G, Mr. Finn, will you look at that? A. "D" as in "dog"?

Q. "G" as in "George."

A. Oh, yes, sir.

Q. Will you identify that?

A. Yes, sir, this is a lease of aircraft, dated the 31st of August, 1951, leasing the aircraft to International Airports at Hangar 2, Lockheed Air Terminal, Burbank, California, and signed by George C. Finn and Charles C. Finn, and also the signature of Donald A. Lanham, president and lessee.

Mr. Blackman: I offer it as International's Exhibit G in evidence.

Mr. Abbott: No objection, your Honor.

The Court: Received in evidence.

(Testimony of George C. Finn.)

(The document referred to, marked Defendant International's Exhibit G, was received in evidence.) [276]

Q. (By Mr. Blackman): Will you look at Exhibit H, please? A. H?

Q. Yes. A. Yes, sir.

Q. Identify it, please.

A. Exhibit H is a supplement to a lease agreement for the lease of the subject—the aircraft in suit to International Airports.

Q. It is a copy of a supplement, is it, Mr. Finn?

A. A copy of a supplement, and refers to, I believe—it says here the blank day of September, 1951.

Q. At any rate, you identify it as a copy of the supplement? A. Yes.

Mr. Blackman: I believe the document has been stipulated to, your Honor, as genuine, and, without objection, we offer it in evidence.

Mr. Abbott: No objection.

The Court: Received in evidence.

(The document referred to, marked Defendant International's Exhibit H, was received in evidence.)

Q. (By Mr. Blackman): Exhibit I, Mr. Finn.

A. Yes, sir.

Q. Identify it, please. [277]

A. This is a photostatic copy of a document, "Supplement to Agreement," which is the supplement to an agreement made between International

(Testimony of George C. Finn.)

Airports and the Finns, and signed by Donald A. Lanham, George C. Finn and Charles C. Finn, and it is dated the blank day of September, 1951.

Mr. Blackman: I offer it as International's Exhibit I in evidence.

Mr. Abbott: No objection.

The Court: Received in evidence.

(The document referred to, marked Defendant International's Exhibit I, was received in evidence.)

Q. (By Mr. Blackman): Exhibit J.

A. Yes, sir.

Q. Identify it, please.

A. Exhibit J appears to be a copy of Exhibit C.

Q. A copy of International's Exhibit C?

A. Yes, sir.

Q. I believe there were three documents introduced under Exhibit J, including the letters dated May 18, 1952, and 19th and 20th.

A. Pardon me. Well, the first one is a copy of Exhibit C, and the back thereof.

Q. Yes?

A. And the next document is a letter dated May 18, to International Airports, stating acknowledgement of [278] possession of aircraft N111H. It is dated May 18, 1952.

Q. Are those your signatures on the document?

A. Yes, sir.

Q. Yours and your brother's?

A. Yes, sir.

(Testimony of George C. Finn.)

Mr. Blackman: I offer it as Exhibit J in evidence. The other represents a duplication, your Honor, of the note. However, it was attached as a part of the certification.

The Witness: Pardon me. There are two others.

Mr. Blackman: I am willing it be removed by the clerk.

The Court: There are two other items there, are there not?

The Witness: Yes, sir. There is another letter, dated May 19, 1952, with markings on it changing a time from 7:00 to 11:00 p.m., and it is signed by George and Charles Finn, and it purports to acknowledge possession of aircraft N111H. And there is a third, a certificate from J. Ostly, the County Clerk of the Superior Court——

Q. (By Mr. Blackman): You don't have to read that, Mr. Finn. That is a formal certificate attached to the certification.

A. And the third, the last document, is a letter dated May 20, 1952, to International Airports, purportedly acknowledging possession of aircraft N111H, and it is in writing, stating "Extended 21 of May until 11:00 p.m.," which is a [279] change from 9:00 p.m., and it is initialed "G.C.F.," which are my initials, and it is signed by George C. Finn and Charles C. Finn.

Mr. Blackman: I offer it as one exhibit, Exhibit J, your Honor, in evidence.

Mr. Abbott: No objection.

The Court: Received in evidence.

(Testimony of George C. Finn.)

(The documents referred to, marked Defendant International's Exhibit J, were received in evidence.)

Mr. Blackman: Now, Mr. Clerk, will you lay before the witness International's Exhibit T for identification?

The Clerk: No, sir, I don't have it. The last I saw it, Mr. Abbott had it.

Do you still have it, Mr. Abbott?

(A document was handed to the witness.)

The Court: Have you now examined Airport's Exhibit T, for identification, Mr. Finn?

The Witness: T—I examined this before, your Honor.

The Court: Yes.

Q. (By Mr. Blackman): Now, the document which you state that you saw in Washington, which was in the same general form as International's Exhibit T, but which contained the words "no formal bill of sale"——

The Court: Now, you are saying it contained. He said it may contain. [280]

Mr. Blackman: I am sorry.

The Court: That is the vice of reciting testimony.

Q. (By Mr. Blackman): Do you recall what serial number that document had on it?

A. It was a form 1316, recalling the form. I do not recall the serial number.

(Testimony of George C. Finn.)

The Court: You mean the serial number of the airplane?

The Witness: The serial number of the airplane. To my best recollection, we were discussing this——

The Court: No, the question is: Do you recall what the serial number was?

The Witness: No, sir, I do not recall the serial number.

Q. (By Mr. Blackman): Was it the same serial number that appears on International's Exhibit T for identification?

The Court: Does it appear to be?

The Witness: It appears to be.

Q. (By Mr. Blackman): Now, laying that aside for the moment, Mr. Finn, and directing your attention to the transaction which you had with International on or about August 31, 1951, did you have a conversation with Mr. Batchelor at that time with respect to the ownership of this airplane?

A. Yes, sir.

Q. And where did that take place?

A. It took place in the Lockheed Air Terminal; the first conversation. I had another conversation with him, [281] more particularly in respect to the airplane, in his office.

Q. Now, with respect to the first conversation, who was present?

A. Mr. Blackman, you were present, and Mr. Batchelor, and my brother and I.

Q. Do you recall what was said with respect to

(Testimony of George C. Finn.)

your ownership of the airplane? A. Yes, sir.

Q. Will you state what was said?

A. In my recollection, that Mr. Batchelor purported to want to buy the plane and wanted to know if we owned it; offered to buy the plane, and wanted to know if we owned it. I said, "We most certainly do own it, and I have a registration certificate to prove it."

He said, "Well, can you show that to me?"

And I said, "I certainly can."

And I had it in my wallet, and I took out the registration certificate for airplane N111H and showed it to him and said, "If I didn't own it, I couldn't get this and I couldn't fly it, so this is my ownership."

Q. By "this," you are referring to the registration certificate, a copy of which has been introduced in evidence as a part of International's Exhibit A?

A. Yes, sir.

Q. At that time or at any time in connection with this [282] transaction up until the time that you received this $15,000, had you ever discussed anything about restrictions on the title of Vineland School District with Mr. Batchelor?

A. No, sir. I didn't discuss any restrictions at all. I mean, I made the statement that I owned the airplane and it was mine and I could do business with it, and I stayed within those limits.

(Testimony of George C. Finn.)

Q. The subject of restrictions upon use or title of Vineland, was that ever discussed between you and Mr. Batchelor?

A. The title—Pardon?

Q. The use or title of that airplane, was that ever the subject between you and Mr. Batchelor?

A. It was a question. Mr. Batchelor said, "Well, how did you get that airplane from the school?"

I said, "I bought it from the school."

He said, "Well, how come?" He said, "I was up looking at it a year or so ago, and they didn't want to sell it."

"Well," I said, "Mr. Batchelor, that is our arrangements with the school, and I own the plane, and you can check on it, and if you are satisfied, we can do business."

Q. But to get directly to my question, was the subject of restrictions ever discussed between you and Mr. Batchelor? A. No, sir.

The Court: By "restrictions," you mean restrictions upon [283] the use or title of the airplane?

The Witness: Yes, sir.

The Court: Did you so understand?

The Witness: Yes, sir.

The Court: You so understand the question?

The Witness: Yes, sir. I mean, no restrictions at all were discussed.

Mr. Blackman: Mr. Clerk, hand the witness Defendants' Exhibit B, please?

(The document was handed to the witness.)

(Testimony of George C. Finn.)

Q. (By Mr. Blackman): Mr. Finn, will you turn to paragraph 8 of that exhibit?

A. 8, beginning, "Said mortgagee hereby declares and warrants"——

Mr. Blackman: I am sorry. I misled you.

Mr. Clerk, I am thinking about the agreement of August 31st, which is International's Exhibit E in evidence.

The Clerk: Exhibit E?

Mr. Blackman: I guess that is the one that is attached to the answer.

The Clerk: I have it here.

(The document was handed to the [284] witness.)

Q. (By Mr. Blackman): Do you see paragraph 8 there? A. Yes, sir.

Q. And that paragraph recites,

> "The Finns warrant that they are the sole owners of said aircraft, free from any or all liens or encumbrances, and furnish International herewith a copy of their Certificate of Registration of said aircraft, authenticated by the Civil Aeronautics Administration."

Did you at the time you executed that agreement, hand Mr. Batchelor a copy of your Certificate of Registration? A. Yes, sir.

Q. And your chattel mortgage, which is Defendant International's Exhibit B in evidence recites,

(Testimony of George C. Finn.)

> "Said mortgagor hereby declares and hereby warrants to said Mortgagee that he is the absolute owner of the legal and beneficial title to the said aircraft and in possession thereof, and that the same is free and clear of all liens, encumbrances, and adverse claims whatsoever."

Was that statement, to your knowledge, the best of your knowledge, at that particular time true?

A. Yes, sir.

Mr. Abbott: I will object to that and move that the answer be stricken. [285]

The Court: The motion is granted.

Mr. Abbott: Conclusion of the witness as nature of intent he had.

The Court: Sustained. The jury is instructed to disregard it.

Q. (By Mr. Blackman): Did you know of any adverse claims on the airplane at that time?

A. No, sir.

Mr. Abbott: Objection. The witness must have been aware of the nature of the claim of the Government, whatever it may have been at that time. He was also——

The Court: Now, how is the state of mind material here? The airport's state of mind might be material on the issue of estoppel.

Mr. Blackman: Well, your Honor, if he made certain representations which International relied upon, and made them in good faith——

(Testimony of George C. Finn.)

The Court: Well, whether he did or not would be immaterial here, would it not, Mr. Blackman? The question would be whether or not International acted in good faith; not whether this witness acted in good faith. I am not suggesting one way or another, whether he did or did not. It is immaterial whether he did or not, is it not?

Mr. Blackman: I think your Honor is correct.

The Court: Sustained. [286]

Q. (By Mr. Blackman): Now, Mr. Finn, in these conversations that you had with Mr. Batchelor, did you tell him that you had obtained a bill of sale to the aircraft from the Vineland School District? A. Yes, sir.

The Court: Unless there is some charge of bad faith on the part of the defendants Finn. Is there any charge of bad faith on their part?

Mr. Blackman: I know of none, your Honor.

The Court: I am not aware of any.

Mr. Abbott: Well, your Honor, on that point, the Government will simply present what evidence it has, and then——

The Court: The good faith or bad faith of the defendants Finn is not in issue, is it?

Mr. Abbott: If the court requires an answer, I will give a candid answer to it.

The Court: If it is in issue, then your objection should be overruled and this defendant should state what he honestly believed and what he felt and what he thought—his state of mind.

(Testimony of George C. Finn.)

Mr. Abbott: At the time that he had these negotiations with International, your Honor, we do have reservations as to his mental state.

The Court: I didn't ask you for reservations. Is it [287] in issue?

Mr. Abbott: His mental state at all times from February 28th to the present time is in issue.

The Court: Then you should withdraw your objection to the question. The ruling will be reversed, and the witness may answer. You may inquire as to the defendant's state of mind in view of the Government counsel's statement.

Q. (By Mr. Blackman): Mr. Finn, I will put the question to you I did a few minutes ago.

At the time you executed the chattel mortgage, which bears the following statement:

"Said Mortgagor hereby declares and hereby warrants to said Mortgagee that he is the absolute owner of the legal and beneficial title to the said aircraft and in possession thereof, and that the same is free and clear of all liens, encumbrances, and adverse claims whatsoever."

Did you honestly believe that statement to be true?

A. I wouldn't have made it if I hadn't believed it.

The Court: Your answer is yes?

The Witness: Yes, sir.

Q. (By Mr. Blackman): Now, going back to the airplane, which I think we still left sitting

(Testimony of George C. Finn.)

around Bakersfield, when was it first removed from the Sunset School grounds?

The Court: Are you going to another subject now? [288]

Mr. Blackman: Yes, sir.

The Court: Have you finished inquiring into his state of mind?

Mr. Blackman: Yes, sir.

The Court: This might be a convenient time to interrupt.

You are excused now for five minutes, ladies and gentlemen of the jury, subject to the usual admonition.

We will recess for five minutes.

(Short recess.)

The Court: Let the record show the jury are present.

You may proceed.

Mr. Blackman: Thank you, your Honor.

The Court: Mr. George Finn, will you resume the stand?

Q. (By Mr. Blackman): We were about to get into another subject. Before we do, I would like to go back to Burbank and these conversations that you had with Mr. Batchelor on about August 31, 1951. I have asked you about restrictions, and I also want to ask you whether or not during any time that you talked to Mr. Batchelor that you ever mentioned a War Assets Administration Form 65 agreement? A. No, sir.

(Testimony of George C. Finn.)

Q. And did you ever hear that subject mentioned in Mr. Batcherlor's presence?

A. No, sir.

Q. As a matter of fact, I asked you that question just [289] before the court started, during the recess, didn't I? A. Yes, sir, I think——

Q. You gave me the same answer, didn't you?

A. I have to go on back on the record and——

Mr. Abbott: That is not proper cross-examination.

Mr. Blackman: It is foundational. Just that one question. And that is the foundation for the——

Mr. Abbott: What counsel asked outside of court——

The Court: Self-serving.

Mr. Blackman: Very well.

Q. (By Mr. Blackman): Mr. Finn, with the exception of what I may have asked you a couple of minutes before court started here——

The Court: This afternoon?

Mr. Blackman: This afternoon.

The Court: Prior to the conclusion of this last recess?

Mr. Blackman: Yes, your Honor.

Q. (By Mr. Blackman): ——have I ever discussed with you the facts of your trip to Washington, or any of the matters that you may have discussed back there? A. No, sir.

Q. As a matter of fact, prior to this trial the Finns have been engaged in some rather heated

(Testimony of George C. Finn.)

litigation against International, and vice versa, isn't that true? A. That is correct. [290]

Q. And that litigation is still pending between us, isn't it? A. Yes. [291]

Q. All right. Now, let's go up to where the airplane was located before it came down to Burbank, and I will ask you whether or not you accomplished certain work necessary to get the airplane ready for flight. A. Yes, sir.

Q. Where was that work accomplished?

A. It was accomplished at Sunset School, the Vineland School District, on their grounds.

Q. Now, was there a period there in the summer when classes were not held in the airplane?

A. Yes, sir.

Q. Was that during the summer vacation?

A. Yes, sir.

Q. Which ended sometime after August 31, 1951?

A. As I recall, that is correct. The classroom was not made available for the next season. We had to get it out of there.

Q. And during that period were you working on the airplane? A. Yes, sir.

Q. Did you fly the airplane away from the Sunset School to some other point before you brought it to Burbank? A. Yes, sir.

Q. Where?

A. The Kern County Airport. [292]

Q. Do you know how long it was there?

A. One day.

(Testimony of George C. Finn.)

Q. Did you have to get any permission from the Civil Aeronautics Administration to move the airplane from Sunset to the Kern County Airport?

A. Yes, sir.

Mr. Abbott: Object, your Honor. That is wholly immaterial because anytime an airplane is flown there has to be a clearance as to safety.

The Court: May it be stipulated that before any airplane is flown in the United States, the continental United States, at any time such clearance must be secured?

Mr. Blackman: Yes, sir, your Honor, I will so stipulate.

The Court: All regularly scheduled airplanes must get clearance before they fly.

Mr. Blackman: And the movement of this airplane followed the regular course of business, so far as that is concerned.

The Court: The presumption is that the law was followed unless there is evidence to show the contrary.

Are you gentlemen able to so stipulate?

Mr. Abbott: We will stipulate that a clearance was granted before the airplane was flown.

The Court: Secured from whom?

Mr. Abbott: Secured from the Civil Aeronautics Authority, [293] permitting flight under restricted conditions.

The Court: And is the jury to understand that in the continental United States before any air-

(Testimony of George C. Finn.)

plane is flown, commercial or private, there must be a clearance obtained from the Civil Aeronautics Authority?

Mr. Abbott: So stipulated, your Honor.

Mr. Blackman: So stipulated, your Honor.

Mr. Nelson: So stipulated.

Mr. Blackman: Your witness.

Mr. Nelson: I have no questions, your Honor.

Cross-Examination

By Mr. Abbott:

Q. Mr. Finn, you have discussed a series of conferences in Washington and the District of Columbia in about the month of April, 1951. Calling your attention to your first conference with Mr. Bradley of the Federal Security Agency, were you talking about several airplanes on that occasion, or about one airplane?

A. I was talking about any school airplane.

Q. Did you at any time in the conversation with Mr. Bradley identify a particular airplane that you sought to have released from Government restrictions? A. Yes, sir, I did.

Q. Will you describe, in particular, that airplane? [294]

A. Well, I referred to an aircraft at the Vineland School that we had rehabilitated.

Q. Now, Mr. Finn, isn't it a fact that you have received from the Vineland Elementary School District two bills of sale for two separate C-46As?

(Testimony of George C. Finn.)

A. Yes, sir.

Mr. Nelson: I am going to object to that line of testimony as to any other aircraft than the one in suit.

Mr. Abbott: Your Honor, I think I can assure you——

Mr. Nelson: As irrelevent and incompetent at this time.

The Court: What is the purpose?

Mr. Abbott: If the court will bear with me, I think the purpose will be apparent. It has a direct bearing on the transaction.

The Court: Objection overruled. The evidence will be received subject to a motion to strike, and if so advised.

Mr. Abbott: Madam Reporter, will you read the last question?

(The question and answer were read.)

The Witness: Yes, sir.

Q. (By Mr. Abbott): What was the serial number of the C-46A to which you received a bill of sale, which is not the airplane in suit?

A. 9-6563.

Q. Did you discuss that airplane with Mr. Bradley or any [295] other representatives of the Federal Security Agency in April of 1951?

A. Yes, sir.

Q. Did you also discuss the airplane in suit?

A. Yes, sir, I believe I did, on the bill of sale.

Q. Now, did you show to Mr. Bradley certain

(Testimony of George C. Finn.)

photographs of the C-46? A. Yes, sir.

Q. And did you show to Mr. Bradley photographs of the C-46 involved in this action, or the other C-46?

A. By the other one you mean 3936, or 9-6563?

Q. Did you show to him any photograph of the C-46 in this action, 42-3645, or the other C-46 for which you received a bill of sale?

A. The other C-46.

Q. You did not show him any photograph of this C-46 in suit here, did you?

A. Not that I recall, no, sir. I don't think I had any photographs.

Mr. Abbott: Mr. Clerk, will you place before the witness International's Exhibit T, please.

The Clerk: He has it here. Exhibit T (indicating).

The Witness: Yes, sir.

Q. (By Mr. Abbott): Mr. Finn, can you tell from an inspection of International's Exhibit T, what particular aircraft [296] that document refers to?

A. I don't see any number on here yet, or any identification.

Q. Now, you have seen this document on several occasions prior to the trial of this cause, haven't you, Mr. Finn? A. Pardon?

Q. You have seen International's Exhibit T on several occasions prior to the trial of this case, haven't you?

(Testimony of George C. Finn.)

A. No, sir, only in Washington.

Q. Yes. Now, do you recall the conversation which led to the inspection of that document?

A. I wanted to see all of the documents in the file of the Vineland School District, if I remember correctly, and they turned these files over to me, and so I examined it right there in the office.

Q. And International's T was a document in that file, wasn't it?

A. I believe it was; I believe, yes, sir.

Q. And in just the form you are viewing it now; isn't that correct?

A. To the best of my recollection, yes.

Q. Now, Mr. Finn, you had ascertained that the aircraft in suit was acquired by the Vineland School District in 1948—correction—in 1946 before you went to Washington, [297] hadn't you?

A. Not exactly. I didn't know when they acquired this airplane. I knew they had acquired it, but I didn't have any documents. The school didn't have any documents. They had all burned up in a fire.

Q. Well, in any event, didn't you recognize International's T, when you saw it in Washington, as relating to the other C-46, not involved in this suit?

A. No, I didn't recognize it at all. I just said —this is in fact what I remember was a statement of "No formal title will be issued," or some such document of that kind.

This looks to me like a Form 1316, and I still can't find on it whether it refers to any particular

(Testimony of George C. Finn.)

airplane. It says "1 C-46 Curtiss Commando Aircraft, $200." I don't see any identification, to know if there is any identification here. I mean, I don't see any.

Q. How many C-46s were there at Vineland, when you were there, Mr. Finn, prior to February 28, 1951? A. There were two.

Q. And does International's T refer to the aircraft in suit?

A. There is no reference here. I mean, this document I saw, or a like document, in Washington, and I do not see any identification here that places this with that particular [298] airplane, on this document.

Q. Well, you see the indication, "Vineland School District, Route 6, Box 7, Bakersfield, California," in the upper left-hand corner, do you not?

A. Yes, sir.

Q. And the date "3-18-48," on the face of the document? A. Yes, sir.

Q. And when you inspected that in Washington, didn't you form the opinion that this document referred to the other C-46?

A. We didn't—no, sir, we didn't go into it that closely. We first went into the fact there was a 1316 agreement, and we did go into the fact that there was no identification on any bill of sale.

If I remember correctly, the way we could identify any particular airplane was through this letter, this Heddleston arrangement, that they said, "We have this day sent a check," and I believe one of

(Testimony of George C. Finn.)

the questions was that there weren't any identifications to go by, and it was imposed upon me to prove my registration chain of title, and identify the airplane.

Q. Well, in that process, the first airplane that you registered was the airplane which is not involved in this suit; isn't that right?

A. That is correct. [299]

Q. And in your conference with the officials of Federal Security Agency, which you have described, you referred to "my airplane" on many occasions, did you not? A. Yes, sir.

Q. Using the singular term "airplane"?

A. Yes, sir. I didn't have any other airplane. Let's see. At that time—yes, sir, I did.

Q. And you showed pictures of the airplane which is not in suit, did you not?

A. Yes, sir.

Q. Did those pictures portray the condition of the aircraft, as it then existed? A. No, sir.

Q. What time were they taken? What date?

A. Approximately, oh, sometime in 1950.

Q. Will you describe, briefly, what the pictures portrayed as to the condition of the aircraft?

A. The pictures portrayed a hull, an airplane that I rebuilt.

Q. And there were no engines on the aircraft as shown in the picture, were there?

A. No, sir.

Mr. Nelson: If the court please, I am going to object at this time to this entire line of questioning

(Testimony of George C. Finn.)

as to what pictures he showed, or anything of that nature, that does not [300] touch upon the conversations which he had back there, which is the only thing in direct evidence. This all seems to be incompetent, irrelevant and immaterial, and has nothing to do with the aircraft in suit.

Mr. Abbott: If it is not apparent, I will be glad to point out the materiality.

The Court: Overruled.

Q. (By Mr. Abbott): Now, in the course of your conversation with the employees of the Federal Security Agency, you were shown the copy of the Form 65 which the Vineland Elementary School had executed, were you not? A. Yes, sir.

Q. And you——

The Court: That is an exhibit, Plaintiff's Exhibit 1?

Mr. Abbott: Plaintiff's Exhibit 1.

The Court: Please refer to them by exhibit numbers.

Q. (By Mr. Abbott): And you and they went over its terms very carefully, did you not?

A. The agreement? Yes, sir, in respect to the regulations.

Q. And they pointed out, among other things, that the first sentence of paragraph 7 of Plaintiff's Exhibit 1, the Form 65 agreement, provided, "That all acquired property when unfit for the above purposes will be sold only as scrap"? That was one of the provisions discussed, was it not, Mr. [301] Finn?

(Testimony of George C. Finn.)

A. No, sir. That provision was not discussed particularly. That was a part, I think, that fitted in with some of the regulations. The provision that we discussed particularly was that it will be reduced to its basic material content.

Q. Well, did you see the first sentence of paragraph 7? A. Yes, sir.

The Court: What did that phrase mean to you, "reduced to its basic material content,"—scrap it?

The Witness: To me, your Honor, that meant all the iron, and aluminum, and copper, or whatever basic material components went up to make the total airplane.

The Court: In other words, the basic material content of the airplane was metal, was it not?

The Witness: Yes, sir; right down to the ingots.

The Court: Then the phrase "reduce it to its basic material content" means to reduce it to metal?

The Witness: Yes, sir.

The Court: That means scrap, doesn't it?

The Witness: No, sir, there is a difference.

The Court: What does it mean to you?

The Witness: It meant to me that this was smelted down to come out as bars of metal of different composition, aluminum, iron, steel, copper, and whatever went into the airplane [302] was smelted down to be the basic material content.

The Court: Well, en route to that state, you would scrap it first, wouldn't you?

The Witness: No, sir.

The Court: You would scrap the plane and

(Testimony of George C. Finn.)

reduce the metal to its basic content, that is, the aluminum portion would be melted down, and then placed in the form of aluminum ingots; is that your notion?

The Witness: That is basic material content, but you could first, on the way to that stage, you could declare it scrap, and that becomes the classification rather than a condition of the airplane. And the question was whether or not this basic material content problem had to be solved, or whether the airplanes could be disposed of as a classification.

The Court: My question was, in reducing an airplane to its Basic material content, it would be necessary to scrap it first, wouldn't it, to physically take it and dismantle it?

The Witness: It would be necessary to physically smash it up, and put the small pieces into the furnace.

Q. (By Mr. Abbott): Mr. Finn, you also discussed with the Federal Security Agency employees paragraph 2 of Plaintiff's Exhibit 1, the Form 65 agreement, which provides that the property to be acquired hereunder is for the sole use of a tax-supported institution for instructional purposes, did you [303] not?

A. We didn't get into that problem, because that was the same as all the other regulations. We only discussed the restrictions, that is, the scrapping, or the warranty clause of the agreement, that called upon the reducing of it to its basic material

(Testimony of George C. Finn.)

content, so that it wouldn't be anything except metal. And that was the concern I had in acquiring the plane to fly; that if I had to do that regardless of any other conditions, what I would have would be metal.

Q. Mr. Finn, will you tell us a little bit more about the condition of the airplane shown or displayed by the pictures which you showed to the F.S.A., the Federal Security Agency's employees?

The Court: Was that a picture of the airplane in suit?

Mr. Abbott: No, your Honor. I think the testimony shows that it was of another airplane.

The Court: Is that correct?

The Witness: Yes, sir.

The Court: In other words, you did not show the officials a photograph of the airplane in suit, but you showed them a photograph of another airplane?

The Witness: Yes, sir.

The Court: Which you owned?

The Witness: Yes, sir.

The Court: Now, do you understand the question? [304]

The Witness: Yes, sir.

The Court: You may answer it.

The Witness: The condition of the airplane was a hulk, with no engines, flat on its belly on the airport.

Q. (By Mr. Abbott): And most, if not all of

(Testimony of George C. Finn.)

those circumstances, were apparent from the photograph, weren't they? A. Yes, sir.

Q. As a matter of fact, you paid a total of $300 to the Vineland Elementary School for that airplane, did you not?

The Court: Which airplane?

Mr. Abbott: The airplane shown in the photograph.

The Court: Which is not the airplane in suit?

Mr. Abbott: Which is not the airplane in suit.

Mr. Nelson: I am going to renew the objection and move the whole testimony be stricken as not being relevant to this action.

The Court: Overruled. The motion is denied. Answer the question. I suggest you reframe it.

The Witness: No, that was for the plane and some junk that was there, I think some propellers in it, but to all intents and purposes, about $300 for this airplane hulk.

Q. (By Mr. Abbott): In any event, you got the airplane and perhaps some other things also, is that correct? A. Yes, sir. [305]

Q. In the course of your conversations at Washington, Mr. Finn, that you have described, in the month of April, 1951, did you use the term "scrap warranty"? A. I believe I did.

Q. And by "scrap warranty," did you mean paragraph 7 of Plaintiff's Exhibit 1, the Form 65 agreement?

A. No, sir, I didn't know what I meant by "scrap warranty," and neither did the Govern-

(Testimony of George C. Finn.)

ment's official. That is what we were discussing, what was this thing called "scrap warranty." And I brought out the regulations, and they brought out the agreement, and we sat down to determine just what was a scrap warranty, and what effect it had.

Q. Well, wasn't the term "scrap warranty" used by you as a shorthand way of referring to the restrictions that were being discussed?

A. No, sir, it was not. It was used as: What was a scrap warranty. That was my problem. If the plane had to be scrapped, and it was to be warranted to be scrapped, just what did such a warranty constitute, and when was it to be done, and how?

I couldn't get any information from the Government officials, so I went to the Law Library, and dug into the regulations to find out what they meant by "scrap warranty."

Q. Mr. Finn, on the occasion of your first meeting with Mr. Bradley, did you tell him that you were there to secure [306] from him a bill of sale to the aircraft you described to him on that occasion?

A. No, sir.

Q. Did you tell Mr. Bradley that you would pay two or three thousand dollars to the Government if permitted to have a bill of sale? A. No, sir.

Q. Isn't it true, Mr. Finn, that on the occasion of your second meeting you had with Mr. Bradley, when there were also present Mr. Davidson, Mr. Hilliard,——

A. Pardon. Mr. Davis. No Davidson. I don't recall a Davidson.

(Testimony of George C. Finn.)

Q. There was a gentlemen there by the name of Davis?

A. Davis, I believe, and Heller, H-e-l-l-e-r.

Q. What was Davis' occupation, if you know?

A. He was the counsel for the Federal Security Agency.

Q. Who else was present at that meeting?

A. There was Mr. Davis, Mr. Heller, Mr. Bradley of the Federal Security Agency, and Mr. Howard and Miss Margaret O'Neil of the Civil Aeronautics Administration, and I was there.

Q. Isn't it true, Mr. Finn, that at the opening of the meeting Mr. Bradley addressed the group, and stated to all concerned that you had applied to the Federal Security Agency for a bill of sale? [307]

A. No, sir, I do not recall that.

Q. Isn't it true that you engaged in a lengthy debate with Mr. Hilliard, and with Mr. Davidson, or Davis, as he is known to you, regarding the validity of the Form 65 agreement, Plaintiff's Exhibit 1? A. Yes, sir.

Q. Isn't it true that in the course of that debate, and throughout its course, each of those gentlemen, Messrs. Hilliard and Davidson, told you that the Form 65 agreement, Plaintiff's Exhibit 1, was valid and would be enforced? A. No, sir.

Q. Isn't it true, Mr. Finn, that at the end of that meeting you were told by Mr. Hilliard that the decisions to be made in this file, if any were to be made, would have to come from the Administrator, because only he could change the Government's policy, and that you should apply to him if you

(Testimony of George C. Finn.)

desired some change in policy? A. No, sir.

Q. Isn't it true that in the course of that meeting, Mr. Bradley outlined to you the authority within the Federal Security Agency, and pointed out that he had no authority to release restrictions upon the title, use or resale of aircraft?

A. No, sir.

Q. Isn't it true, Mr. Finn, that Mr. Bradley told you [308] that the long-standing policy of the Department, the Federal Security Agency, was to make aircraft, when they became surplus to the needs of the school available to the military establishment, or at least, that had been their policy since the Korean War?

A. Yes, sir. I believe he did make that statement.

Q. And he told you that absent some instructions from his superior, he would have to adhere to that policy, didn't he?

A. No, sir, I don't believe he said that, because I went to the military myself, and asked them.

Q. I am not asking where you went, but what statements were made by Federal Security Agency employees in your presence.

A. No, I do not recall he made the statement he would have to adhere to anything of that kind.

Q. Did he tell you he was going to change the policy arranged between the Federal Security Agency and the Department of Defense?

A. No, sir.

(Testimony of George C. Finn.)

Q. He said nothing that would lead you to believe that he was going to alter that policy, then?

A. He didn't say that he would. He didn't say that he wouldn't.

Q. He simply told you that the policy existed?

A. Yes, sir. [309-310]

Q. (By Mr. Abbott) Did you, in fact, see the administrator of the Federal Security Agency at any time during the year 1951? A. No, sir.

Q. Did you contact any other person in the Federal Security Agency, other than those you have named in your testimony today?

A. I think not. I don't recall anybody. I saw a lot of Government officials. I don't recall now whether any of them could have been Federal Security Agency employees or not. But to my best recollection, it is these people that we are talking about here.

Q. Mr. Finn, in your direct examination you said that in the course of the meeting attended by Messrs. Heller, Davis or Davidson, Bradley and yourself, and Mr. Howard, that you brought up the topic of some policy letter sent by Federal Security Agency to the Civil Aeronautics Administration.

A. Yes, sir.

Q. Had you seen that policy letter?

A. Yes.

Q. When and where did you see it?

A. I saw it in Miss Margaret O'Neil's office of the Registrar, Civil Aeronautics Administration.

Q. What was its date, Mr. Finn? [311]

(Testimony of George C. Finn.)

A. I don't recall the date. I just don't recall it. I wish I had the letter.

Q. Are you sure, Mr. Finn, that you saw that letter before the conference of April, 1951?

A. I am quite certain I saw that on the first time I talked with the Civil Aeronautics Administration about registering the airplane.

Q. So you are certain that the letter couldn't have borne a date earlier than April, 1951, or you couldn't have discussed it at that time, is that correct? A. I would say so.

Mr. Nelson: If your Honor please, at this moment I would like to renew my previous objection. I haven't seen any connecting it up by the Government of this original inquiry into this other C-46 aircraft; whether or not photographs were used for any other purpose except to identify the type of planes that were involved.

The Court: Motion denied. You may renew the motion, if you are so advised, upon the conclusion of the examination.

Q. (By Mr. Abbott): Mr. Finn, while counsel are looking at the documents I have just placed before them, will you state what statements you made to Mr. Bradley identifying the airplane which you were discussing with him?

A. Well, I wasn't discussing any particular airplane with him. I was discussing the scrap warranty agreements and [312] arrangement, after he had told me I must first inquire into this to find out what the regulations were.

(Testimony of George C. Finn.)

Mr. Bradley was helping me solve a problem, the way it started, and I kept asking him what should I do further, and he was very helpful. He gave me all the information, and I kept searching and searching, and I brought back in data, and asked that we have a meeting based upon what I had discovered. And this meeting took place upon that, to determine whether or not the scrap warranty situation existed.

Q. Well, in any event, getting back to the topic, Mr. Finn, did you supply him with the serial number of the airplane there you were referring to?

A. Yes, sir. I believe I did. In fact, all the documents were in the file in the War Assets—I mean, Mr. Bradley's file, and the serial numbers—there was a question as to Vineland's acquiring that plane at this particular time, I believe, and we used this file and put it out on the table to discover the acquisition of these planes by Vineland School.

Q. And actually, that file contained documents relating to both the C-46s you had seen at Vineland, didn't it?

A. Yes, sir, I believe it did.

Q. Did you ever identify——

A. No, there was another document which didn't say [313] which one is which, and I think that is this one here.

The Court: "This one here," being——

The Witness: Exhibit T.

(Testimony of George C. Finn.)

The Court: International Airports' Exhibit T?

The Witness: Yes, sir.

The Court: Have you gentlemen concluded your examination of these documents last handed to you by counsel?

Mr. Nelson: I beg your pardon, your Honor, I am sorry.

The Court: I merely inquired whether you had concluded your examination of the documents?

Mr. Nelson: Yes, we had, your Honor.

Q. (By Mr. Abbott): Mr. Finn, I am handing to the clerk—and I ask they first be marked for identification—a letter dated January 2, 1952, addressed to the Acting Deputy Administrator, Civil Aeronautics Administration, from W. T. Frazier, Property Utilization Co-ordinator, Health and Education, and ask you if you ever saw that letter?

The Court: It is marked——

The Clerk: Plaintiff's Exhibit 11 for identification.

(The document referred to was marked Plaintiff's Exhibit 11 for identification.)

The Court: Your answer?

The Witness: Pardon. I would like to read it.

The Court: Can't you answer the question without——

The Witness: After I read the letter. [314]

The Court: Very well.

Do you have to read all of it to determine whether

(Testimony of George C. Finn.)

you can answer whether you ever saw it before?

The Witness: Yes, sir. There may be two similar letters. If I can identify this one, I will

The Court: Proceed. Take all the time you want.

The Witness: The first one, your Honor, I did not see.

The Court: There is only one, as far as I know.

The Witness: There are two here, your Honor.

The Court: Does Exhibit 11 for identification comprise two letters?

Mr. Abbott: It didn't intend to be. There may be a second attached.

The Court: Please get the exhibit, Mr. Clerk. Are these impeachment documents?

Mr. Abbott: They are, your Honor.

The Clerk: There are two letters here.

The Court: Let the record show one of the letters have been removed by counsel for the Government, and Exhibit 11 for identification, now the exhibit as revised, is before you for examination.

The Witness: Your Honor, I do not recall seeing this letter.

The Court: "This letter," being a letter dated——

The Witness: January 2, 1952. [315]

Q. (By Mr. Abbott): Does that letter say, in substance, what the letter that you saw at Civil Aeronautics Administration said, Mr. Finn?

A. No, sir. There is a lot on this letter that was not on the letter that I recall seeing.

(Testimony of George C. Finn.)

Q. Mr. Finn, haven't you from time to time, and subsequent to January 2, 1952, looked through all the material on the topic of this letter in the possession of the Civil Aeronautics Administration?

A. Pardon? When was this?

Q. Subsequent to January 2, 1952?

A. This is January 2, 1952. This letter is dated—no, sir. The only time that I saw any letter, and only one letter that I recall, was in April of 1951. This letter is dated January 2, 1952. And I have never seen this.

Q. Mr. Finn, my question was, haven't you reviewed the records of this topic in the office of the Civil Aeronautics Administration in Washington after January 2, 1952?

A. No, sir. I don't think I went in there again at all on that situation. I was there in April of 1951. I did go back one time to get this registration certificate number corrected, to the Civil Aeronautics Administration, but not into the Federal Security Agency—or, just to the Civil Aeronautics Administration registration office, that I recall.

Q. Have you caused any person to make inquiry at the [316] Civil Aeronautics Administration to determine what correspondence there is relating to the subject of the letter you are viewing?

A. No, sir.

Q. Plaintiff's 11 for identification?

A. Yes, sir. I asked in pretrial hearing that any policy letter, the policy letter which I saw in April be produced. This is not it.

(Testimony of George C. Finn.)

Mr. Abbott: Will you read that letter aloud, Mr. Finn, and state in what particulars it differs from the letter which you did see?

Mr. Blackman: Just a moment. To which we object as certainly calling for a witness' comparison of two written documents, and we believe that is not a proper way to get before the jury the contents of this particular letter, which he states he never saw.

The Court: Sustained on the latter objection.

Mr. Abbott: Then may I have permission to lay the foundation, and after laying the proper foundation, showing this is the only letter on the point?

The Court: You may ask him to read the letter himself. If you ask him to read the letter out loud—the letter is not in evidence.

Mr. Abbott: I will be happy to comply with the court's suggestion. [317]

Q. (By Mr. Abbott): Will you please read the letter yourself and point out how it differs from the letter you saw in April, 1951?

A. I don't see where it has any similiarity. It is a wholly different set of circumstances altogether.

It states here—it asks for a 15-day period in which to check certain items of registration before any registration is granted. And I don't recall at all. And it—also, in the other letter, I don't think it asked for any time limit to do anything. As I recall, it was, "Would you please not register an airplane without approval."

(Testimony of George C. Finn.)

Q. Is the general subject matter the same, Mr. Finn?

A. No, it is not. This definitely states that, "If this 15-day period can be arranged by your office, it is believed that this Agency would be able to take appropriate action to correct the irregularity without any embarrassment to your office."

No such a situation existed in April, as I recall it.

Q. Do both the letter that you are viewing and the letter you saw in April, 1951, refer to a request by the Federal Security Agency to Civil Aeronautics Authority not to register aircraft purchased from schools for a certain period?

A. I believe that was the gist of the letter. I wish you would bring the letter so I will be able to tell you what it was, because I would like to have it. I saw it. I cannot [318] recall other than the fact that they had a policy—a kind of family arrangement between the Federal Security Agency and the Civil Aeronautics Administration, that they would not register any airplane unless the title was determined. That was essentially what it was in there, because I came in to register this title and they said, "We will have to check." And that is why we had this meeting.

Mr. Abbott: The entire correspondence on the point and lack of correspondence on the point, will be the subject of evidence on its cause, Mr. Finn.

The Witness: Pardon?

The Court: Do you have the letter?

Mr. Abbott: No, your Honor. I will produce a

(Testimony of George C. Finn.)

witness who will testify there is no letter on the topic except that one before the witness, Plaintiff's Exhibit 11.

The Court: Very well.

The Witness: Your Honor, how could I see——

The Court: You aren't here to argue the case. You are here to testify as a witness.

Q. (By Mr. Abbott): Mr. Finn, were you interviewed by special agent Richard Buxton of the FBI? A. Yes, sir.

Q. On June 7, 1952?

A. I believe I was, yes, sir.

Q. And did that interview occur in the office of Vincent [319] V. DiGeorgio in Bakersfield, California? A. Yes.

Q. Were the persons present Mr. DiGeorgio, yourself, your brother Charles Finn and Mr. Buxton of the Federal Bureau of Investigation?

A. Yes, sir.

Q. Did you, in the course of that interview, describe to Mr. Buxton the transactions in the spring of 1951, in Washington, which you have described here?

A. Pardon? What transaction are we referring to, now?

Q. Did you, describe to Mr. Buxton the conversations which you had with Mr. Bradley, Mr. Heller, Mr. Davidson in the City of Washington, D. C., in the month of April, 1951?

A. I don't think I described the conversations. I know that I referred to the meeting that we had

(Testimony of George C. Finn.)

there. And he questioned me as to whether or not the information that I had on the registration certificate was cleared through Washington, and I told him it had been.

Mr. Abbott: Will you read the pending question, Mr. Reporter?

(The question was read.)

The Witness: When was this meeting, in 1953?

Q. (By Mr. Abbott): My question relates to an interview on June 7, 1952.

A. June 7, 1952. [320]

The Court: You just testified it occurred.

The Witness: I don't——

The Court: In Bakersfield.

The Witness: I don't recall June 7, 1952. We hadn't been served by any papers by the Government—when was it, July?

Q. (By Mr. Abbott): Was there a meeting in the spring or summer of 1952, with Mr Buxton, Mr. DiGeorgio, yourself and your brother, Mr. Finn?

A. Yes, sir. I have to locate these dates as to it was a year after we had registered the airplane, more than a year after we registered the airplane—1952. Yes, sir, I had——

The Court: The question is, did you tell Mr. Buxton and those other persons about the conferences you testified to this morning that you had in Washington?

The Witness: Yes, sir. I recall——

(Testimony of George C. Finn.)

The Court: With Mr. Bradley and the others.

The Witness: Yes, sir, I recall.

Q. (By Mr. Abbott): Did you on that occasion tell that group of persons, and in particular Mr. Buxton, that in your conversations with Mr. Bradley of the Federal Security Agency, Mr. Bradley had stated that the scrap warranties would have to be met?

A. Now, I may have told him that what Mr. Bradley stated [321] before we had our meeting, but not at the meeting. The meeting was to determine whether or not the scrap warranty had to be met, and what it was.

Q. Did you tell Mr. Buxton that at the end of the meeting Mr. Bradley stated that he would have to abide by the scrap warranty regulations?

A. No, sir. I don't recall that I told him that.

Q. Did you make any statement to that effect to Mr. Buxton?

A. To that effect, I may have made the statement in respect to this Department of Defense situation which I had looked into. I went further than that, I believe. This is a little out of context as to that particular conversation with this FBI agent. I was telling him a story of what happened, and I don't know where you are fitting these questions in, because the references were made all the time. I was raising this question as to whether or not this scrap warranty had to be complied with; that was the question upon which we had the meeting, to resolve that point.

(Testimony of George C. Finn.)

Q. Did you tell Mr. Buxton at the time of the interview I have described in my prior question, that at the close of the conference between yourself, Mr. Howard, Mr. Bradley, Mr. Heller, and Mr. Davidson, Mr. Bradley had stated that he would have to abide by the scrap warranty [322] regulations?

A. I don't recall making that statement.

Q. Did you make a statement to that effect?

A. I believe I made a statement to that effect in respect to this statement that he made, that he would have to check with the Defense Department.

Q. Mr. Finn, what has the Defense Department got to do with the statement Mr. Bradley made at the close of the conference between Bradley, Heller, Davidson, Howard and yourself?

A. The essential point that he was making was we would have to clear all this with these various agencies, and I had already done that.

Q. Then did Mr. Bradley, at the close of the conference I have last described, say, in substance or effect, that he would have to abide by the scrap-warranty regulations?

A. No, sir, I don't believe he said that. I believe that——

Q. All right. Did you tell Mr. Buxton that he said that, or words to that effect?

A. I may have. I do not—only in respect to what I considered Mr. Bradley's statement in respect to this clearance, this Defense Department matter.

(Testimony of George C. Finn.)

That was all I referred to with Mr. Buxton.

Q. Was the topic of Defense Department policy discussed at the close of the conference between yourself, Howard, [323] Bradley, Heller and Davidson?

A. I don't recall whether it was at the close or at the beginning. It was within the meeting. I can't pinpoint the discussion. I know that it came up. I know that I resolved it on the grounds that I had already been to Major Dykman, of the Adjutant General's office, and asked the Air Force if they required any more C-46s, and they said they did not, and I——

Mr. Abbott: I move to strike all that. The witness is going far afield.

The Court: Motion granted. Move to something else.

Q. (By Mr. Abbott): Mr. Finn, is it true or false that you said to Mr. Buxton, in effect that at the close of the conference between Messrs. Bradley, Heller, Davidson and Howard, Mr. Bradley stated that he would have to abide by the scrap warranty regulations?

A. No, sir, I cannot say yes or no to that, true or false, as to what, in effect, I stated. I do not recall. I don't just remember the conversation.

Q. You may or may not have said that to Mr. Buxton? A. I may or may not.

Q. What was the approximate date that you first saw the Form 65 agreement, Mr. Finn?

(Testimony of George C. Finn.)

The Court: Exhibit?

Mr. Abbott: Plaintiff's Exhibit 1. [324]

The Witness: Aproximately in—it was in April, in Mr. Bradley's office.

The Court: April, what year?

The Witness: 1951.

Q. (By Mr. Abbott): In early April, was it not, Mr. Finn? A. Yes, sir.

Q. Now, calling your attention to Vineland's Exhibit B, which I will request be placed before you, an instrument entitled "Agreement," dated February 28, 1951, and in particular to page 3 of that agreement, where there are specified certain things that you and your brother were to do in consideration of the sale of the aircraft in suit to you, and in particular paragraph III, subparagraph 2, which reads:

"To pay to the District the total sum of $5,000."

Has that sum ever been paid to the District before or after the meeting, Mr. Finn?

Mr. Blackman: Just a minute. We object to that as being incompetent, irrelevant and immaterial to any issue in this case.

The Court: Overruled.

The Witness: Pardon? Page 3?

The Court: Did you pay the $5,000 to the Vineland School District? [325]

The Witness: He asked me what it says in this document. I did not pay any $5,000 to the Vineland——

(Testimony of George C. Finn.)

Q. (By Mr. Abbott): Did you pay any money whatsoever to the Vineland School District for the purchase of the aircraft in suit?

A. No, sir, no cash money. [326]

Q. You say "cash money." Did you make any payment by check?

A. Well, I put in gas tanks, and built a small apartment, and provided a small airplane.

Q. We are coming to that, Mr. Finn. There are some other items in Roman numerial III of work that you were to do in the school district, are there not? Now, did you complete each of those items, Mr. Finn, and all of them?

A. No, sir, I didn't complete all of them.

Q. What was the approximate date that you flew the aircraft from Burbank, California, to Bakersfield, California, Mr. Finn?

The Court: From Burbank?

The Witness: From Burbank to Bakersfield?

Mr. Abbott: It is my understanding there was such a flight in approximately June of 1952, your Honor.

The Witness: I did not fly the airplane, sir.

Q. (By Mr. Abbott): Was it flown in June of 1952, from Burbank to Bakersfield, Mr. Finn?

A. Yes, sir, I believe it was.

Q. By Whom?

A. My brother and Jack Schuler.

Q. Do you recall the date of that flight?

A. I was in New York, I think. I don't recall the date. I wasn't here. As I recall—well, I don't

(Testimony of George C. Finn.)

recall it. I [327] can't give you the exact date, but I can determine it. I can ask my brother.

Q. How soon after June of 1952, did you return to California?

A. I made several trips East, and I think I came back some time in the latter part of June.

Q. Where was the aircraft in suit then?

A. It was in Bakersfield, at the Kern County Airport.

Q. How long did it remain in Bakersfield, Mr. Finn? A. Until January the 18th, 1953.

Q. Who was in possession of the aircraft from that date in late June, when you saw it, until January 18, 1953, if you know?

A. The Finns, or there is a question. It was either the Finns or it was the school, or it was the United States Government. There was quite a discussion as to who legally had it.

Q. How long were you and your brother in possession?

The Court: Are you referring to actual physical possession?

Mr. Abbott: I am, your Honor.

Q. Actual physical possession, Mr. Finn, after June of 1952?

The Court: That includes having it under your control. You don't have to be in it, but under your control. [328]

The Witness: It was under our control, subject to anything that the School District wanted to do with it upon reference to us. We put this airplane

(Testimony of George C. Finn.)

there, and nobody touched it but us, except the Marshal who came to seize it, and he didn't touch it.

Q. (By Mr. Abbott): Well, on what date was the latter occasion, when the Marshal came to seize it?

A. In September—well, the affidavit states——

The Court: What was the date, if you know?

The Witness: Well, your Honor, there were two seizures.

The Court: Just tell us what your recollection is.

The Witness: I recollect the whole thing.

The Court: What date do you recall it happened? That is what we are asking, and not what someone else said.

The Witness: Your Honor, I recall all of the times the Marshal allegedly seized the airplane.

The Court: All right. That is what you are being asked. When did he first seize it?

The Witness: When did he first seize it?

The Court: The date.

The Witness: September the 16th or 18th, 1953.

Q. (By Mr. Abbott): Had you and your brother been in possession of it continuously from June of 1952 to that date in September that you have last identified?

A. No. I believe my brother called up Mr. Giorgona [329] and said, "Now, we brought the airplane back. There is some question or controversy over it and our agreements with International, and here is the airplane. We promised we would take care of our requirements and dealings with the

(Testimony of George C. Finn.)

school, and the airplane is now here at the airport in Kern County."

And the county counsel—I didn't talk to him, because I didn't fly it, I can ask my brother.

Q. Are you repeating by hearsay what someone else has told you?

A. That is what my brother told me.

Mr. Abbott: I will move to strike the testimony.

The Court: Motion granted.

The Witness: I have the knowledge of it.

Q. (By Mr. Abbott): Mr. Finn, on May 25, 1952, did you and your brother remove the aircraft in suit from the hangar of the International Airports, Inc., at Burbank, California?

A. Yes, sir.

Q. Did you use force in removing the airplane on that occasion?

A. It depends on what you mean by "force." We took six men in there and put a tow chain on the tail end of the airplane and towed it off the International's property.

Q. Did anyone protest? A. No, sir. [330]

Q. Were there any employees or agent of International present at that time?

A. Yes, sir.

Q. What, if anything, did they say about your removing the aircraft in that fashion?

A. Well, as I recall, I was at the tail end of the airplane, and I learned later that one of the fellows took out a pack of cigarettes and handed it to the other fellow and said, "You might just

(Testimony of George C. Finn.)

as well light up, because there isn't anything we can do," and off came the airplane.

We had a winch and a tow truck which we had rented, and a crew of men whom we had been employing to reassemble this airplane, and we just went in and took it out.

Q. What persons employed by International Airports, Inc., were present on that occasion?

A. Well, I think a fellow named Spencer or—well, there were two. One of them was, I believe, a foreman of the shop, and the other fellow was a mechanic, and these were the two men that I recall as being there at the hangar door.

This airplane was not in the hangar. This airplane was only projecting into the hangar as far as the nose section, and it was outside.

The Court: Did you ask the permission of anyone at International Airports to take possession of it?

The Witness: No, sir. [331]

The Court: You just went in with these men and took it?

The Witness: Yes, sir.

Q. (By Mr. Abbott): Did you make any statement to any of the employees of International who were present, as to what you were doing with the airplane?

A. I think I said—I was at the back of the plane. Then I went up forward, because we had to roll the wheels, and I think I made the statement that no-

(Testimony of George C. Finn.)

body better interfere with this, because this is our airplane and we are taking it.

Q. Did you have with you any weapon of any type on that occasion? A. Nothing, no, sir.

Q. Did anyone who accompanied you have any weapon of any type? A. No, sir.

Q. Was there any protest made by the employees of International?

A. As I recall, they just took it as a matter of course, and I recall this incident. The head man took a package of cigarettes out of his pocket and offered it to the other fellow, and he said, "You might just as well keep out of this and light up," and they just turned their backs, and this fellow that offered the cigarette took it out and started smoking, and I think the other fellow went over to call on a telephone. [332]

The Court: Was that before or after you made the statement they had better not interfere?

The Witness: I think that was before I made the statement. Nobody made any effort to prevent us from doing this thing. It was early in the morning, it was Sunday. There wasn't anybody around.

The Court: What were these two men doing? Did they have their backs turned to you, smoking the cigarettes, when you made the statement that nobody had better interfere with you?

The Witness: They were working at the other end of the hangar when we started to take the plane. We did not notify them that we were going to take it, because we were going to take it anyway.

(Testimony of George C. Finn.)

So, as I recall, these men came forward from the back end of the hangar as we were moving the plane, because it was caught between a building, the wing tip, and we had some difficulty getting it out of there, and they just rushed up, and I made this general statement, I believe, just offhand, regardless of whether anybody was there or not, "that nobody had better interfere, because this is our airplane, and we own it, and we are going to take it." I am inclined to make that kind of a statement in respect to this plane.

The Court: You don't need to make any explanation about that, except as you need to explain your answer.

The Witness: Now, I don't think it was as a result of [333] that statement that these fellows didn't interfere. I think it was more or less as a result of our past experience, and they just didn't want to get into any entanglement over this airplane.

The Court: Your next question.

Q. (By Mr. Abbot): Mr. Finn, you then removed the airplane to a point some distance away on the Burbank airfield, did you not?

A. Yes, sir. The answer to that first question is, no force was used.

Q. After removing the airplane to a point some distance away at the air strip at Burbank, was the airplane thereafter seized by a Marshal of the Los Angeles Municipal Court, acting pursuant to

(Testimony of George C. Finn.)

process in an action brought in the state court by International Airports against you?

Mr. Blackman: If counsel will change that word "Municipal" to "Superior," your Honor.

Mr. Abbott: Then it will be the Sheriff. I am in error.

Q. Was the airplane thereafter seized by the Sheriff of Los Angeles County? A. Yes, sir.

Q. And that was pursuant to the action of International Airports versus Finn then pending in the Superior Court of Los Angeles County? [334]

A. Yes, sir.

Q. How long did the Marshal retain possession of the airplane?

A. I believe this time he complied with the statute.

The Court: How long did it stay in his possession?

The Witness: I have to recall the statutory provision.

The Court: You don't have to give us your mental thinking. Just give us the time.

The Witness: Approximately ten days, if that is what the statute requires. He held it as long as the statute requires.

Q. (By Mr. Abbott): Then he delivered possession in your presence to representatives of International Airports, Inc.?

A. No, sir, I had left then.

Q. Your brother was present?

(Testimony of George C. Finn.)

A. Yes, sir.

Q. Did you witness any of the transactions relative to possession of the aircraft after the Sheriff turned it over to International and before it was removed from Burbank to Bakersfield?

A. No, sir.

Q. Returning for a moment to the April conferences in Washington, Mr. Finn, you have quoted Mr. Howard at some length. Isn't it true, Mr. Finn, that in the conference between yourself, Mr. Davidson, Mr. Bradley, Mr. [335] Hilliard, and Mr. Howard, Mr. Howard stated that CAA registration would have no effect upon the question of title as between yourself and the Federal Security Agency, because under the statute registration was no evidence of title?

A. Are you quoting Mr. Howard?

Q. In substance, Mr. Finn. That is the question I put to you. [336]

A. In substance, Mr. Howard said the CAA would not register the airplane unless I could prove a chain of title from the War Assets to the School.

Q. No, Mr. Finn, did he say to you the thing which I asked? Did he tell you that in substance?

The Court: Why don't you put the question again?

Mr. Abbott: I will, your Honor.

The Court: Isn't it a fact that at that time and place he said to you, in substance, the following——

Q. (By Mr. Abbott): Isn't it a fact, Mr. Finn,

(Testimony of George C. Finn.)

that at the time and place of the conference you have described in Washington, between yourself, Mr. Hilliard, Mr. Davidson, and Mr. Howard, that Mr. Howard said to you that registration of an aircraft to you by the Civil Aeronautics Administration would have no bearing upon the dispute between yourself and the Federal Security officials relative to title, and use, and scrap warranty, because registration was no evidence of title, and that title was a question to be decided by the courts?

A. In substance, no.

Q. Did he say anything like that, Mr. Finn, to you?

A. He said this, "You will have to have a chain of title before we can register the airplane for flying purposes." The question here was not whether or not I had title, but that I had to prove it, and if I could prove the title—— [337]

The Court: Are you talking about what he said to you?

The Witness: Yes, sir.

The Court: Is that what he said?

The Witness: If I could prove the title, they would register the airplane, providing the airplane wasn't in somebody else, and a condition subject to something else, a condition subject to reversement, and that was the only question I had with the CAA, would they register.

The Court: This is what Mr. Howard said?

The Witness: Mr. Howard said, "So far as registering this airplane, Mr. Finn, you will have to prove a chain of title."

(Testimony of George C. Finn.)

And I said, "If I prove the chain of title, Mr. Howard, will you register the airplane?"

"Yes, provided you prove it."

And that is why we had the meeting.

Q. (By Mr. Abbott): Mr. Finn, didn't Mr. Howard refer to the Civil Aeronautics Act? Didn't he mention that to you, Mr. Finn?

A. You mean that the CAA registration was not a certificate of title?

Q. Yes. In fact, didn't he tell you that under the Act the certificate would not resolve your dispute with the Government, or the Federal Security Agency, because a certificate of registration is not evidence of title or ownership? [338]

A. There was no dispute. I read that section myself.

The Court: You knew that part of the statute already, did you?

The Witness: Yes, sir. I wasn't questioning whether or not this would be an acceptance of title. I was questioning whether or not the registration would be granted for flying the airplane, so there wouldn't be any scrap restrictions on it.

It wasn't a question of whether or not it could be sold. It was a question of whether it could be sold as scrap, or mutilated, or what, and that is the requirement as I presented it to Mr. Howard, "I can't fly this airplane unless I get a registration on it."

Q. Then the only thing you were discussing

(Testimony of George C. Finn.)

in Washington with the representatives of the Federal Security Agency and the Civil Aeronautics Administration was whether you could fly the plane, not whether you had a right to its possession, or title to it; is that right?

A. That wasn't the only thing. I had a right to the title of it as scrap, or if I refused it, it would be basic material content. That was our question.

Then the question was, having the right to the title of it, would they allow me to register it for flying purposes, and remove the scrap restrictions, because of a policy letter initiated by the Federal Security Agency requesting the CAA [339] to back them up in that position, because a registration would remove the nonflight characteristics, and so I brought them together to find out.

Q. Now, you have testified that you yourself knew about the Civil Aeronautics Act, and had read the provision to which I referred?

A. Yes, sir.

Q. But didn't Mr. Howard also expressly refer to that in his conversations with you, Mr. Finn?

A. I do not recall that. I think it was common knowledge. We both discussed the fact of a registration being proven title. I did not, and do not now maintain that registration is proving title, but I do maintain I had to prove it to them in order to register it.

Q. We are not asking about your contentions, but just what was said to you by Mr. Howard.

A. Mr. Howard said, "Prove your chain of title, and I will register it for you."

(Testimony of George C. Finn.)

Q. Referred to the following provision at 14 C.F.R., Section 501.9:

> "Any registration of aircraft shall be null and void if at the time of registration the person registering as owner was not the true and lawful owner of the aircraft."

The Court: The question is, did he make any mention of [340] that regulation at this conference?

The Witness: Yes, I believe he did, because that is the way I went and read the regulations.

Mr. Abbott: No further questions, your Honor.

The Court: Any further examination of the witness?

Mr. Nelson: If the court please, I do not want to press the court too much on this matter, but once again I wish to renew my motion that all of this matter that came in as to the other C-46 aircraft be stricken, as it was not connected up, and we submit there was a great deal of equipment involved in the aviation program, and if it is going to be discussed, we will be here for weeks, so I move it be stricken.

Mr. Abbott: Your Honor, I am not in this case in a campaign to discredit the School District. This matter was only brought out to show the aircraft discussed at Washington.

The Court: It seems it is necessary here to illuminate the witness' testimony. Motion denied.

Any further examination of this witness? [341]

Mr. Blackman: Yes, your Honor.

(Testimony of George C. Finn.)

Cross-Examination
(Continued)

By Mr. Blackman:

Q. You have been asked about this conversation you had with Mr. Howard.

Mr. Blackman: Mr. Clerk, will you lay before the witness Defendants' Finn Exhibit K-1, please?

(The document was handed to the witness.)

Q. (By Mr. Blackman, continuing): As a part of these conversations that you had with Mr. Howard, did he deliver that letter, or any copy of that letter to you?

A. No, sir, he didn't deliver this to me.

Q. Where did that letter come from, if you know?

A. This is a letter signed by Mr. Howard in my file on Aircraft N111H, which I discovered upon asking the CAA for a complete certified copy of my file.

Q. Did Mr. Howard tell you substantially what is contained in that letter? A. Yes, sir.

Mr. Abbott: If the court please, we will offer this handwritten statement by Mr. Howard of the Civil Aeronautics Administration as Finns' Exhibit K-1. We believe that the Government has sufficiently gone into this question of the conversation with Mr. Howard so as to make this document admissible. [342]

(Testimony of George C. Finn.)

Mr. Abbott: Your Honor, the Government went into the conversations with Mr. Howard.

The Court: Is there objection?

Mr. Abbott: There is objection.

The Court: State your objection.

Mr. Abbott: It is this: that the document is hearsay, that it is simply an opinion of law, that it is in no way related to the matters which the Government went into, which were to ask about conversations between Mr. Howard, Mr. Davidson, Mr. Hilliard and Mr. Bradley, and the Government went into those conversations with Mr. Howard only when they were gone into by counsel, over objection by the Government.

The Court: May I see the exhibit, Mr. Clerk?

(The document was handed to the court.)

The Court: Objection overruled. Received in evidence.

(The document referred to, and marked Defendants' Finn Exhibit K-1, was received in evidence.)

Q. (By Mr. Blackman): Mr. Finn, will you take a look at Exhibit K-1, in evidence now, and please read it out loud?

The Court: It speaks for itself. He does not need to read it. We can all read it, and the jury can read it at the proper time. He will not read it out loud.

Mr. Blackman: Very well.

Q. (By Mr. Blackman): Mr. Finn, you were asked by [343] counsel concerning certain items in

(Testimony of George C. Finn.)

connection with the School District contract of February 28th, 1951, Vineland's Exhibit B. You made the statement that you did not perform all of those items. Now, do you have a copy of Defendants' Exhibit B in front of you?

A. Defendants'——

The Court: That is the agreement of February 28, 1951?

Mr. Blackman: Vineland's B.

The Witness: Oh, Vineland's B, yes, sir.

Q. (By Mr. Blackman): Calling your attention to the items which counsel questioned you about on page 3, starting in with paragraph 3, can you tell us what items you did perform for the School District?

A. We delivered them an aircraft, in one.

Q. Which aircraft was that?

A. That is the C-46, 9-6563.

Q. That is paragraph sub-1 on page 3?

A. Yes. But we did not——

Q. What else?

A. But we did not conform it to all the specifications of Exhibit 8. We did as to some of them, and not as to others.

The Court: You mean all the specifications set forth in that agreement, Vineland's Exhibit B? You did not conform the aircraft, as required by Exhibit B, is that what you are [344] saying?

The Witness: Only partly. We did not pay them $5,000.

3 says—I don't have Exhibit A, I don't believe,

(Testimony of George C. Finn.)

because it says to furnish all of the material and equipment in Exhibit A. I don't have Exhibit A. [345]

Mr. Blackman: There are some other documents that relate to this contract. Do you have it, Mr. Nelson?

Mr. Nelson: Aren't the specifications on the back of Exhibit B there, Mr. Finn?

The Witness: Not on this one, Mr. Nelson.

The Court: Apparently the exhibit is incomplete, gentlemen.

Mr. Nelson: We will certainly get those specifications before the court, your Honor.

The Court: Were there some of those that you did not furnish?

The Witness: Furnished some and didn't furnish others.

Q. (By Mr. Blackman): In general, what did those specifications relate to?

A. I do not recall. I know that there were many things we had to do, and I believe they were listed on Exhibit A. But in general, oh, they had to do with putting in gas tanks and pumps on the field, providing them with small airplanes, rehabilitating a girl's apartment that was being used for educational purposes, and supply them with equipment for machine shop or carpenter shop. And I think there were lights for the stage.

The Court: Can you tell us, as you go along, whether you did these things or not?

The Witness: We did many of them and others we didn't [346] do.

(Testimony of George C. Finn.)

The Court: Is that sufficient for your purposes?

Mr. Blackman: Yes, sufficient for the purpose, your Honor.

Q. (By Mr. Blackman): The faithful performance bond of $2100, was that posted?

A. We posted this faithful performance bond as 10 per cent of the total price of $2100, value considered to be $21,000 for the plane.

Q. And did the School District ever send you any notice asking you to go ahead and comply with the other items which you stated you hadn't complied with up until the time that this suit was filed?

A. No. They extended the time. We were having some difficulty, and they were very kind to us, and went along; and we have had very fine relationships with the school, and that was the reason for it.

Q. As far as you are concerned, do you still intend to go ahead and do these things?

A. Yes, sir.

Mr. Abbott: Objection. That is wholly immaterial.

The Court: Overruled.

The Witness: Yes, sir, we will complete every agreement we ever made.

Q. (By Mr. Blackman): Mr. Finn, you have been asked [347] concerning these photographs that you exhibited back at Mr. Bradley's office. I am not clear on this, and I would like to ask you,

(Testimony of George C. Finn.)

did you, in exhibiting the photographs for one airplane, state to Mr. Bradley that these were actually photographs of the airplane in suit?

A. No, sir.

Q. Well, do I understand you to say then, now, that the photographs you exhibited were photographs of the other airplane located at Vineland School? A. Yes, sir.

Q. And those photographs, as they were exhibited to Mr. Bradley, were they represented to be anything else other than that? A. No, sir.

Mr. Abbott: I will object. The state of the record is only airplane was mentioned in the conversation.

The Court: That calls for his conclusion. The objection is sustained and the answer is stricken. And the jury is instructed to disregard it.

Q. (By Mr. Blackman): Did you tell Mr. Bradley that the photographs which you exhibited to him on that occasion were photographs depicting the airplane in suit? A. No, sir.

Q. Did you tell him that they, in fact, depicted the airplane which was still located, which is still located at [348] Vineland?

A. Yes, sir.

Q. Is there any question in your mind on that point? A. No, sir.

Q. All right. And you have expressed some difference in your mind between scrap as such and reducing an airplane to its basic material content.

(Testimony of George C. Finn.)

Will you explain to me what you mean by the word "scrap"?

Mr. Abbott: Your Honor, the word has a meaning defined by law in this connection; defined in the regulations.

The Court: Hasn't he already covered that? I understood him to say reducing it to basic material content is one step beyond scrap. Scrap, then you reduce it to its basic material content, you mean melt down the aluminum and mold it into ingots, and that.

Mr. Blackman: Yes, your Honor. I think basic material content, there is no question about, and as counsel just stated, there is a definition of the word "scrap" in the regulations.

The Court: Isn't it sufficient that, whether or not the witness understood, that meant a plane that wouldn't fly?

Mr. Blackman: Well——

The Court: Scrapped plane didn't mean a plane that would fly, to you?

The Witness: Oh, yes, sir, many planes sold as scrap that [349] fly.

The Court: I said, a scrapped plane, if it were in fact scrap, it did not mean it would fly, did it?

The Witness: Now, there is a question.

The Court: Well, I withdraw it.

Mr. Blackman: If your Honor will bear with me just a moment on this——

The Court: Let's proceed. I want to finish with this witness. I won't permit you to ask the ques-

(Testimony of George C. Finn.)

tion. I withdrew my own. Now, move on to something else.

Mr. Blackman: All right. May I ask Government counsel if he has a copy of the regulations which contains the definition of the word "scrap"? Then may I put the question?

The Court: What?

Mr. Blackman: Ask him if this is what he understood by the word "scrap." And then I will be finished with this witness.

The Court: Very well. Do you have the regulation?

Mr. Abbott: I don't have it with me.

The Court: Do you know what language is in the regulations defining scrap?

The Witness: I believe I do.

The Court: Does that conform with your understanding of it?

The Witness: Your Honor, I would like—I mean, my [350] conformity with the understanding——

The Court: Did your understanding of the term as you used it in your discussions with these people, did it conform with what was set forth in the regulations as defining scrap, or were you talking about something else and they were talking about the regulations?

The Witness: No. There was—I would have to review the regulation on that particular score.

The Court: Get the regulation. We are going to finish with this witness. Get the regulation.

(Testimony of George C. Finn.)

The Witness: Nobody knows what scrap is.

The Court: I didn't ask you that.

Put any other question you have, Mr. Blackman.

Mr. Blackman: That will finish the examination.

The Court: Anyone else have anything else of this witness?

Mr. Nelson: No questions.

Q. (By Mr. Abbott): With regard to the matters which have been inquired into by Mr. Blackman, didn't you tell Mr. Bradley that you had a bill of sale from the Vineland School District to one airplane, Mr. Finn?

A. I told him I had a bill of sale from Vineland School District to the airplane.

Q. To the airplane? A. Yes. [351]

Q. Did you ever talk about having a bill of sale to more than one airplane in discussions with Mr. Bradley? A. No, sir.

Q. And isn't it a fact that you showed to him the pictures you have described in your testimony as pictures of the airplane under discussion?

A. No, sir, it is not a fact. I did not.

The Court: Why did you show him the picture of the other airplane?

The Witness: Question of whether or not this was scrap; what constitutes scrap. Here was an airplane all torn down. Is this scrap? Does the——

The Court: That is why you showed him the picture, to inquire whether he thought the other airplane depicted in the picture was scrap?

The Witness: Whether this airplane——

(Testimony of George C. Finn.)

The Court: Which airplane?

The Witness: Depicted in the picture was a scrapped airplane upon which we could base any consideration for conformity to the scrap regulation, or did the scrap regulation exist at all; could an airplane be built up from the wing tip to a condition of flight, or what was necessary to remove any restrictions, if such existed; and what was scrap and what wasn't scrap. That was the purpose of bringing this airplane before this group. [352]

Q. (By Mr. Abbott): Isn't it a fact, Mr. Finn, that the first airplane that you registered with the Civil Aeronautics Authority was the airplane displayed by the picture which you showed to Mr. Bradley? A. That is absolutely so.

Q. And did you describe the airplane in discussions with Mr. Bradley by its serial number?

The Court: Which airplane?

Mr. Abbott: The airplane that he discussed with Mr. Bradley, whatever it may have been, your Honor.

Q. (By Mr. Abbott): Was that described by its serial number?

A. I think that came out of the records in Mr. Bradley's office, of the total file in the Vineland School District. I didn't have to offer any position there at all. He had a record.

Q. You just didn't say anything, because he had all the records?

A. That is right. We determined from his records what airplane was depicted in the pictures.

(Testimony of George C. Finn.)

Q. You did determine that?

A. I believe so.

Q. Who? You or Mr. Bradley, or both of you?

A. I think Mr. Bradley and I—I mean, we had a discussion over this. How do I recall this situation? I am not [353] sure. I am not sure as to how that came about.

Q. Mr. Finn, you have testified that you did a part but not all of the work described in paragraph III of Vineland's Exhibit B. Did you do that before or after you first saw the Form 65 in Washington? A. Afterwards.

Mr. Abbott: We now offer in evidence International's Exhibit T.

The Court: Is there an objection?

Received in evidence.

(The document referred to, and marked Defendant International's Exhibit T, was received in evidence.)

Mr. Abbott: No further questions of the witness.

Q. (By Mr. Blackman): Mr. Finn, at the time you showed these photographs to Mr. Bradley, you told him that you intended to fly your airplane, being the one in suit, did you not?

Mr. Abbott: Objection. The question is leading and assumes an erroneous state of the record.

Q. (By Mr. Blackman): During the conversation that you had with Mr. Bradley, did you tell

(Testimony of George C. Finn.)

him you wanted to register the airplane for the purpose of flying it? A. Yes, sir.

Q. And the airplane that you depicted in the photograph, being the other one located at Vineland School [354] District, was that the type of airplane that could, under any type of rehabilitation process, have been put back into flight service?

A. Yes, sir.

Q. And do you have the photographs that you showed to Mr. Bradley back there?

A. I don't know. Possibly I could locate them. I will look.

Q. And did you tell Mr. Bradley that you wanted to rehabilitate and put back into flight service the airplane that is depicted in those photographs? A. Yes, sir.

Q. And was there any question raised as to whether or not you could do that?

Mr. Abbott: I will object to the form of the question. Does counsel mean legally——

Q. (By Mr. Blackman): Was anything stated by Mr. Bradley as to whether or not you could do that?

A. Yes. He said I could do that. I would have to get a registration.

Q. He said you could do that?

A. Pardon me. It was all predicated on the fact I could prove the title and get registration, or I couldn't fly it, anyway. That was—were the questions that were raised. [355]

The Court: Is the regulation here?

Mr. Blackman: Yes, sir. At least, I have an ex-

(Testimony of George C. Finn.)

cerpt that defines the word "scrap." I don't have the original.

The Court: I believe the Government has brought in something.

Q. (By Mr. Blackman): Mr. Finn, Section 8304.1, subsection 4 of the regulations—we can call them Regulation 4—defines the word "scrap" as follows:

> "Scrap means property that has no reasonable prospect of sale except for its basic material content."

Now, did you understand the scrap in the sense that it is stated by the regulation?

A. "Reasonable prospect of sale," yes, sir.

Q. All right. And did you understand by that that the airplane could be put into flight service and still be scrapped within the meaning of that regulation?

Mr. Abbott: Objection. That calls for a conclusion of law, pure and simple.

Mr. Blackman: Your Honor, we've been asking the witness here whether or not he understood scrap to be basic material content——

The Court: Read the question, Mr. Reporter.

(The question was read.)

The Court: If I understand your question correctly, I [356] understand you mean by that, could there be an airplane that could be flown, be regu-

(Testimony of George C. Finn.)

larly used in flight that would fall within that category.

Mr. Blackman: Yes, your Honor.

The Court: No prospect of selling it.

Mr. Blackman: No reasonable prospect of sale.

The Court: Except——

Mr. Blackman: Except for basic material content.

The Court: Objection overruled. You may answer it.

The Witness: Yes. That is what I understood it to be. And I believe I read a further regulation that stated if it was not, the airplane could be considered scrap—scrap, if it did not measure up to the Civil Aeronautics Authority requirement at the time.

The Court: If it did not measure up to the Civil Aeronautics Authority requirement at the time, no flight permit would be issued for it, would it?

The Witness: Yes, it may, if it was registered.

The Court: You mean the Civil Aeronautics Authority would permit you to fly an airplane which did not measure up to its requirements?

The Witness: Yes, sir.

Mr. Blackman: Well, your Honor, in that connection, the airplane in suit, when it was moved from the Sunset School to the Kern County Airport, and from the Kern County Airport to [357] Burbank, at no time did it comply with Civil Aeronautics Authority requirements.

(Testimony of George C. Finn.)

Q. (By Mr. Blackman): At no time did it comply with Civil Aeronautics Authority requirements, did it? A. No, sir.

Q. But the Civil Aeronautics Authority nevertheless gave you a permit to ferry it?

A. Yes, sir.

The Court: That is just a limited flight. In other words, it depends on whether you are trying to fly it commercially or not. You can fly an airplane any time, I suppose——

The Witness: If it has a registration on it.

The Court: I suppose if an airplane is in the process of overhaul at International Airports and some tools over at Burbank, or vice versa, that the Civil Aeronautics Authority would give the mechanic the authority to fly it over to the other airport, but for no other purpose.

The Witness: Only if it had a registration on it.

The Court: That is what you mean when you say an airplane could be scrap and still be a flyable plane, isn't it?

The Witness: No, sir.

The Court: You don't mean that it could still be scrap and used to transport passengers in commercial service? Is that your answer? [358]

The Witness: It could be. I mean, it depends on where you are going to use the commercial service. If you were flying the airplane in Mexico, it would be scrap according to the standards of the Civil Aeronautics Authority in this country, and it

(Testimony of George C. Finn.)

would be a perfectly good flyable airplane in Mexico. And an airplane that is scrap, they are being used in Mexico.

Q. (By Mr. Blackman): Did you discuss with Mr. Bradley whether or not it could be scrapped within the meaning of this regulation at the time it was actually sold by the Government, and yet still within the meaning of the regulation be rehabilitated for flight?

A. Yes. I brought the point out—there was a question of not whether or not the airplane was scrap, or whether I had to scrap it, but whether or not I would fly it and remove any restrictions on the basis of granting to me by the Government a registration—I believe that the airplane was flyable, but whether or not I could get a registration on it, in other words, to allow me to fly it, was a requirement that had to be cleared through the Civil Aeronautics Authority, and I had to prove the title to the plane before they would give me the registration which would allow me to fly it. Now, we get back to that same agreement.

Q. To prove the title to the plane, you had to prove you were within the requirements of the agreement? [359]

A. Until I proved to the Civil Aeronautics Authority title of the plane, they would not issue the registration.

The Court: Any further questions?

Mr. Blackman: That is all.

Mr. Abbott: One question, your Honor.

(Testimony of George C. Finn.)

Q. (By Mr. Abbott): Was it then your effort, in your discussions with Mr. Bradley and the other Federal Security Agency employees, to demonstrate to them that the plane was in fact scrap within the meaning of Plaintiff's Exhibit 1, the Form 65 agreement?

A. No. I did not attempt to demonstrate the plane was in fact scrap. I asked them what was a scrap warranty, what was a scrap airplane, what was a restriction, and what was a removal of a restriction. Nobody seemed to know.

Q. You tried to persuade them that the airplane was scrap, did you not?

A. I didn't try to persuade them. I merely brought the data, just as I would have solved a mathematical problem, and put it before them and asked them to determine whether or not they were going to allow me a registration on this airplane so that I could——

Q. And that data included the pictures that you have previously described?

A. No, sir. I did not refer to those pictures on that airplane. [360]

Mr. Abbott: No further questions.

The Court: You may step down, Mr. Finn. You are excused from further attendance as a witness. If you attend this trial it will be of your own volition——

The Witness: Thank you, sir.

The Court: As a party, in view of your an-

(Testimony of George C. Finn.)

nounced intention not to participate, and you may not feel called upon to appear.

The Witness: If I attend the trial any further, it will only be to protect what rights I have.

The Court: If you participate in the trial, of course, you will be participating, you understand that——

The Witness: Yes, your Honor. We will be here.

The Court: ——not under any order of the court.

The Witness: That is correct, yes, your Honor.

(Witness excused.)

The Court: Now, is there any occasion to require Mr. Charles Finn to appear?

Mr. Nelson: No, your Honor.

Mr. Abbott: We wish to ask him a few questions, your Honor, in rebuttal.

The Court: You mean tomorrow or——

Mr. Abbott: Whenever rebuttal for the Government is on the calendar, your Honor.

The Court: How much more testimony will there be on the [361] Vineland case?

Mr. Nelson: We still have to put on our case, and I would imagine it would not take more than one hour.

The Court: How about you, Mr. Blackman?

Mr. Blackman: I think our case should not take more than an hour. That is, our examination, not cross-examination.

The Court: Well, you are excused, Mr. Charles

Finn, until tomorrow afternoon at 1:30. You are instructed to return here at that time. But you need not return tomorrow morning, unless you so desire.

Mr. Charles C. Finn: Thank you.

The Court: The trial will be recessed until tomorrow morning. Any objection to resuming again at 9:30, ladies and gentlemen?

If not, until tomorrow morning at 9:30 o'clock. And again, before we separate, I must admonish you of your duty not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of this trial; and not to form or express an opinion on the case until after it has finally been submitted to you for your verdict.

You are now excused until tomorrow morning at 9:30.

(The jury retired from the courtroom and the following proceedings were had in the absence of the jury.) [362]

The Court: The trial will recess until tomorrow morning at 9:30 o'clock.

Mr. Abbott: May we have permission to file proposed instructions, your Honor?

The Court: Is it stipulated, gentlemen, the jury have left the courtroom?

Mr. Nelson: So stipulated.

Mr. Blackman: So stipulated.

The Court: Yes. You may serve and file proposed instructions, if you desire.

(Testimony of George C. Finn.)

Mr. Abbott: I am now filing the original and a copy, and handing a copy to each of counsel, and parties not represented by counsel.

Mr. Blackman: Your Honor, in that regard, will we be informed before the matter is submitted upon what issues the matters are that are to be submitted to the jury?

The Court: Yes. We will discuss that and formulate the question. We will have ample opportunity, apparently, because if we can close the testimony tommorrow, the case will have to go to Wednesday morning for submission to the jury. I didn't anticipate the testimony would be so lengthy. I promised one member of the jury, as you may recall, she is on the election board, and I told her that she would not be called upon to serve here on Tuesday; and in any event, I am not disposed to hold court on election day. So we will have [363] some opportunity to work these matters out.

Mr. Abbott: In that connection, your Honor, the testimony today has necessitated contact with Washington to bring another witness to Los Angeles, who may not be here tomorrow. I think the Government's rebuttal will take about a day, in any event. The witness may not be here tomorrow, and if he is not we would like to present his testimony on Wednesday when court resumes. May it be understood that that will not be too late for the presentation of his testimony? I can assure the court no time will be lost, as I am confident all available

time will be taken in with the instructions and further evidence.

The Court: We will see how it goes.

Mr. Nelson: If the court please, in order to save time in the morning, as indicated to the court the other day, we will show a film identifying this aircraft, and the condition and use. Could we have permission to set up the equipment before court opens tomorrow morning so we will not have to take the time of the court to do that?

The Court: Yes, you may; any time you think most convenient.

Mr. Nelson: Thank you.

The Court: Anything further, gentlemen?

Mr. Abbott: Nothing further.

The Court: Unitl 9:30 tomorrow morning. Court will [364] adjourn.

(Whereupon, at 5:00 o'clock p.m. a recess was taken until 9:30 o'clock of the following day, Friday, October 29, 1954.) [365]

No. 14770

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC., a Corporation, PETER A. BANCROFT and VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,

Appellees.

and

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C. FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

Transcript of Record

In Two Volumes

FILED
OCT 11 1955
PAUL P. O'BRIEN, CLERK

Volume II
(Pages 507 to 1010)

Appeals from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-9-55

No. 14770

United States
Court of Appeals
For the Ninth Circuit.

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Volume II
(Pages 507 to 1010)

Appeals from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-9-55

Friday, October 29, 1954—9:40 A.M.

The Court: Are there ex parte matters?

In the case on trial, let the record show the jury is present.

You may proceed.

Mr. Nelson: If the court please, I would like to call this morning, Mr. Peter A. Bancroft.

The Court: You may.

PETER A. BANCROFT

called as a witness on behalf of defendant Vineland Elementary School District, having been previously sworn, was examined and testified as follows:

The Clerk: You have been sworn, have you not, Mr. Bancroft?

The Witness: Yes.

The Clerk: Be seated, please.

Direct Examination

By Mr. Nelson:

Q. State your occupation, Mr. Bancroft.

A. School superintendent.

Q. And at what school?

A. In the Vineland School District. [368]

Q. How many schools do you have in the Vineland School District? A. Two schools.

Q. Would you name them?

A. Yes. The Vineland School and Sunset School.

Q. During the course of the last few days we have heard that these schools are near Bakersfield,

(Testimony of Peter A. Bancroft.)

Arvin and Lamont. Just where are the schools situated concerning these towns, other towns?

A. That has been erroneous. The two schools are situated in the Vineland School District, and our town as such is Weed Patch; no connection with Lamont or Arvin.

Mr. Nelson: Would the clerk please put before the witness Vineland's Exhibit E?

Q. (By Mr. Nelson): Mr. Bancroft, would you briefly describe this instrument so the court will be aware of what we are discussing?

A. Exhibit E is listed as "War Assets Administration." And the purpose of this document is to list the types of property offered by War Assets Administration, I believe, two school districts.

Q. Have you at all times been present at the Board of Trustees meetings concerning the subject aircraft? A. Yes, I have.

Q. And did your Board of Trustees consider an instrument [369] such as this in connection with the purchase of the subject aircraft?

A. Yes, sir.

Mr. Nelson: May I see the exhibit, Mr. [370] Clerk?

Q. (By Mr. Nelson): I wish to read a portion of this instrument to you, Mr. Bancroft, and ask whether or not your board and yourself has read this and are aware of it?

Mr. Abbott: Objection, your Honor. The instrument is not in evidence.

The Court: Do you wish to offer it?

(Testimony of Peter A. Bancroft.)

Mr. Nelson: Yes, we will offer this instrument in evidence at this time.

The Court: Vineland's Exhibit E——

Mr. Nelson: Vineland's Exhibit E.

The Court: ——for identification. Is there objection?

Mr. Abbott: No objection, your Honor.

The Court: It is stipulated to be a genuine document in all respects it purports to be?

Mr. Abbott: So stipulated.

The Court: Very well. Received in evidence.

(The document referred to, marked Defendant Vineland's Exhibit E for identification, was received in evidence.)

Q. (By Mr. Nelson): I read on the front page thereof, under Paragraph II:

"Distribution under this plan will be confined to aeronautical property which has been determined by the disposal agency to be commercially unsalable by reason of its condition resulting from damage, wear, obsolescence, or otherwise, [371] has no reasonable prospect of sale except as scrap, or with respect to which by reason of its large supply or prior use the estimated cost of care, handling and disposal will exceed the estimated proceeds unless it is promptly sold as scrap, or with respect to which the estimated cost of care, handling and disposal will exceed the estimated proceeds as scrap, or otherwise."

Was your district board aware of this portion

(Testimony of Peter A. Bancroft.)

of the agreement at the time they considered purchasing this aircraft? A. It was.

Mr. Abbott: I will object to the form of the question. This is not a part of any agreement, your Honor. It is a catalog form, with instructions.

The Court: Sustained. The answer is stricken. Do you wish to rephrase the question?

Mr. Nelson: No, your Honor. We will bring it out in argument, probably, at a better time.

Q. (By Mr. Nelson): What was the district's purpose, Mr. Bancroft, in acquiring the subject aircraft, and to what use was it put?

A. Our district is very poor. In fact, in our county there are 54 elementary districts, and we are in the bottom three in ability to take care of the needs of the children of our district, and that is still the case, by the way. [372]

We had a number of children, in fact a large number, in our schools, and many of them were sent to us from a labor camp operated by the Government. To be specific, 300 children came to our school district from this camp situated in our district, and the Government paid us $345 in lieu of taxes for these 300 children. Now, that was a year's payment.

This group of children from this camp only increased our problems, and we didn't have the facilities to house these children.

We needed the classrooms, and being poor, we couldn't pay for them. About the same time we gave a survey to the children of our district, because we

(Testimony of Peter A. Bancroft.)

had a big delinquency and truancy problem there. Those of you who are connected with rural areas will realize that we have problems that are different from urban areas. We had all these children, many of them were of bad habits, and it was our problem to provide classroom space with the idea of trying to eliminate some of the delinquency and truancy. So we gave a survey to these children of 50-some subjects, and we asked the children to list by a 1, 2 and 3, their preference for study, and this survey showed that 80 per cent of our student body were interested in aviation..

So, as we were trying to provide a solution to the problem to eliminate delinquency and truancy, we felt aviation should be a part of the program. So at that time we began to [373] investigate the possibilities of obtaining any type of surplus aircraft equipment.

We investigated with various governmental agencies at the time, and we found there were laws restricting the supplying of any surplus aircraft to elementary schools. High schools and colleges might get it, but not elementary schools.

We felt that was a very unfair restriction, it didn't help us, but we were bound by it. That went on for some time, and we were still trying to solve this problem, and were unsuccessful. Finally we were able to obtain some of these aircraft.

This district, being poor, presented various problems to us educationally and financially, and in this

(Testimony of Peter A. Bancroft.)

little town of Weed Patch, you might be interested that it was here that John Steinbeck spent considerable time and wrote his "Grapes of Wrath." This was the area in which this book was written.

Q. Mr. Bancroft, you might restrict the testimony a little bit down to the use of the actual aircraft, although I realize you are bringing it down to the purposes. Bring it down to the use, if you can, at this time.

A. Upon receiving the aircraft, we immediately put it into use as a classroom. The students started to work on it, cleaning it up. It was very dirty after being stored in the open for a number of years, and some of the first things we did was, as I say, to clean it up. It was our firm intention [374] never to fly it again. This was to be a classroom, and it was only of value to us as such. So we filled the gasoline tanks with water, we filled the tires with water, dug holes in the ground in the spot it was to be put in, we built concrete piers to try to save the tires from deteriorating completely by resting the wheel structures on them. We tore out bulkheads and installed forced air coolers of the type we use in the desert air country up there, and disconnected the mags. So that the engines were all completely disconnected, and the plane would be safe, as well as nonusable as a flight instrument.

Q. Does the district have in its possession a film that shows the condition of the subject aircraft, and its identification markings and the present use

(Testimony of Peter A. Bancroft.)

of the aircraft—strike out the phrase "present use"—the use of the aircraft?

A. Yes, sir, it does. [375]

Q. Approximately when was this film taken?

A. I believe it was during the year 1949.

Q. And where was the aircraft at the time the film was taken? A. At our Sunset School.

Q. Were you present at the time the film was made? A. Yes, sir, I was.

Mr. Nelson: We would like to have this film marked at this time, your Honor, as Vineland's Exhibit F for identification.

The Court: It will be so marked.

Mr. Nelson: And if we may have leave of the court, we would like to show this film at this time.

The Court: Do you offer it in evidence?

Mr. Nelson: And I offer it into evidence.

The Court: Any objection to the offer?

Mr. Abbott: No objection.

Mr. Blackman: No objection.

The Court: It is received in evidence.

(The document referred to, marked Defendant Vineland's Exhibit F, was received in evidence.)

The Court: You may exhibit it.

Mr. Nelson: Mr. Bancroft, would you step down and run the film. It is about a three-minute film and shouldn't take very long. [376]

The Court: Very well.

(Testimony of Peter A. Bancroft.)

(Whereupon the film was exhibited.)

Q. (By Mr. Nelson): Mr. Bancroft, you have testified when the Government had you on the stand in the course of their presentation, that there were various offers to the District to purchase this aircraft, and that they were turned down; and also, that the Finns had made various offers and were turned down.

What is the reason the District finally determined to sell this plane to the defendants Finn?

A. The reason that the previous offers were turned down was that, basically, as you can see by the film, we had a classroom, very functional and popular with the students, and we wished to keep it. And until the final offer by the Finns, nobody had shown us how we could still keep a classroom there, and by offering the old airplane, which they, in the contract, agreed to completely set up so in all appearances it would be the same as the plane in suit, no one had ever done that before, and that is why we weren't interested.

Q. Did the Finns also make some offers to obtain the proper clearances and waivers from the Federal Government? A. Yes, they did.

Q. Had the other persons made such an offer?

A. They did not.

Mr. Nelson: We have already reviewed the presentation of [377] the bids, and I believe we have stipulated the bid was accepted. Isn't that true, Mr. Abbott? It won't be necessary at this time——

(Testimony of Peter A. Bancroft.)

Mr. Abbott: Which bid?

Mr. Nelson: The bid of the Finns that was finally accepted. I am trying to avoid going through all that process again.

The Court: Address your remarks to the court, Mr. Nelson.

Mr. Nelson: Yes, your Honor, I will do that.

The Court: Are you asking for a stipulation? Are you offering a stipulation?

Mr. Nelson: I believe there is a stipulation before the court that the bid was presented by the Finns in accordance with the—not in accordance—but along with the notice, and that those are before the court. I will not take the time of the court to go through the procedure of presenting that with Bancroft, unless the Government——

The Court: The exhibits are here in evidence?

Mr. Abbott: There are two bids, your Honor, is the reason for my question; one dated December 5, 1950, which is Vineland's Exhibit C, and another dated January 19, 1951, which is Finns' Exhibit L; both in evidence.

Mr. Nelson: They are all in evidence, your Honor, so I will just ignore going through that.

The Court: Very well. [378]

Q. (By Mr. Nelson): Were specifications drawn, Mr. Bancroft, for all bidders to review in connection with the sale of the subject aircraft?

A. They were, sir.

Q. And were those specifications at the School

(Testimony of Peter A. Bancroft.)

District's office? A. Yes, sir.

Q. And were they there at all times so that anyone could review them in connection with the purchase of this aircraft? A. Yes, sir.

Q. And did the School District advertise to sell this plane and allow anyone to come in and make a bid that desired? A. That is correct, sir.

Q. How long a time did the School District allow for other bidders to come in?

A. Well, the advertisement by law must be posted two weeks, and I think we actually had the specifications there prior to that time and during the full two-week period.

Q. Were other prospective bidders contacted personally or by mail besides the advertisement material?

A. No, sir. We didn't, that I can recall, contact anyone directly.

Q. Were the specifications reviewed by the county counsel prior to the time that the agreement was signed?

A. They were checked by the county counsel. Whether it [379] was prior to that time, I am not sure.

Q. All right. Did the specifications provide for the furnishing of the District with another C-46?

A. Yes, sir.

Q. And what was the purpose of the District asking for this other C-46?

A. We had the classroom in operation, liked it,

(Testimony of Peter A. Bancroft.)

needed it, and wished to continue it that way. And so we wouldn't consider any possible disposal of the airplane in suit unless we were certain we could have an adequate plane replaced.

Mr. Nelson: Will the clerk please hand the witness Vineland's Exhibit A?

Q. (By Mr. Nelson): Do you recognize this document? A. Yes, sir.

Q. Is it, in general, the notice to bidders which your district published? A. It is, sir.

Mr. Nelson: I wish to read to the court, your Honor, the second paragraph there, as follows:

> "All bidders are further notified that the successful bidder shall be required to furnish the District with a non-flyable C-46 type aircraft, or equal, designed for educational purposes pursuant to and in accordance with the specifications on file in the Office of the Superintendent, where such [380] specifications may be examined and copied. Such successful bidder shall be required to furnish the District with said non-flyable aircraft, together with instruments of title thereto, and at no cost whatsoever to the District."

And in the middle of the first paragraph, "Bidders are expressly notified that the aforesaid aircraft was acquired by the District from the Government of the United States and the War Assets Administration, subject to certain restrictions in the

(Testimony of Peter A. Bancroft.)

use thereof, under the deed of conveyance, and the successful bidder will be required to secure the necessary releases to said restrictions from the proper governmental agency of the United States."

Q. (By Mr. Nelson): Calling your attention, Mr. Bancroft, to the last paragraph just read, concerning the necessity of removing of restrictions, would you state the intent of the Board?

Mr. Abbott: I will object. The Board's intent is immaterial. It is the formal act that is material to this proceeding.

The Court: Is there any issue here as to the good faith of the School District?

Mr. Abbott: Not of the School District, no.

The Court: There would be no issue of the good faith of the Board. [381]

Mr. Abbott: That is correct, your Honor.

Mr. Nelson: If I may be heard in that respect: the intent of the Board in demanding that restrictions be removed, both in the offer of bids and as it appears in the contract later on, is extremely in point in this action. If there is any ambiguity which arises, and which has been alleged in the agreement between the defendants Finn and the school board, that ambiguity must be determined in accordance with the intention of both parties; and that is the point which we are going to have to get before the court in this action.

Mr. Abbott: The instrument appears to be clear and unambiguous; prepared by a lawyer. The counsel doesn't point out wherein it is ambiguous.

(Testimony of Peter A. Bancroft.)

I don't notice any ambiguity on its face. Certainly, the parol evidence rule is applicable.

Mr. Nelson: We intend to connect this matter up, your Honor.

The Court: Overruled.

Q. (By Mr. Nelson): Would you please state, Mr. Bancroft, the intention of the Board in connection with this clause which appears in the Notice requiring the waivers and restrictions to be removed?

A. I think it is very evident in the Notice that the Board never had any intention at any time——

Q. If I may interrupt. We aren't particularly interested in what you think. Do you know what the intent of the Board was in connection with that clause? [382]

A. Yes. The Board never did have any intention of releasing this aircraft, title to it, whatever the word "title" means—that seems to be quite a problem—but of releasing the plane permanently to anybody until all Government restrictions had been released, and that is why we went to the trouble of having those specifications in the notice, and in the contract itself.

Q. Was your bid opening at a public meeting?

A. Yes, sir.

Q. Was the public invited to attend that meeting?

A. The public is invited to attend any regular board meeting.

(Testimony of Peter A. Bancroft.)

Q. Was that a regular board meeting?

A. Yes.

Q. Was counsel present at the bid opening?

A. No, sir, it wasn't.

Q. Was anyone present at the bid opening to pass upon the legality thereof?

A. No, sir; only the school board and the administration.

Q. Were the Finns present?

A. I believe they were, sir.

Mr. Nelson: Would the clerk please put before the witness Vineland's Exhibit B, the agreement between defendants Finn and the Vineland School District?

Q. (By Mr. Nelson): You are familiar with this agreement, [383] are you not, Mr. Bancroft?

A. Yes, sir.

Q. Are you familiar with page 2 thereof, paragraph I, wherein it indicated that the District is to transfer its right, title and interest to the subject plane upon execution of the agreement?

Mr. Abbott: Your Honor, I object to that as a mistaken reading of the agreement. It says:

"The District hereby transfers all——"

Mr. Nelson: I will read the exact language, if the court please.

Mr. Bancroft, paragraph I states as follows:

"The District hereby transfers all rights, title and interest in and to that certain C-46 aircraft, No. 2-3645 to the contractors effective immediately upon execution of this agreement."

(Testimony of Peter A. Bancroft.)

Q. (By Mr. Nelson): You are familiar with that provision, are you not?

A. I am trying to find the particular part.

Q. That is page 2, Roman numeral I—paragraph I.

A. I don't have a Roman numeral I on page 2 of this one.

Mr. Nelson: Mr. Clerk, may I see that?

This is a copy of the original. Therefore, it appears on page 1 thereof. [384]

Q. (By Mr. Nelson): You are familiar with that provision? A. Yes, sir.

Q. Now, I call your attention to page 4—better make it paragraph IV, since perhaps yours does not comply with the same page number—paragraph IV, and it reads as follows:

> "It is expressly agreed and understood that this agreement is contingent upon the contractor's ability to secure the necessary clearances from the Government of the United States of America on restrictions now existing on the use and possession of the aforesaid described C-46 aircraft, No. 2-3645, by virtue of the Deed of Conveyance of said aircraft from said Government of the United States to the District, and by virtue of the federal laws on the use thereof. Therefore, notwithstanding any other provisions in this agreement, it is agreed and understood, as follows:——"

(Testimony of Peter A. Bancroft.)

Can you state the intention of the District in light of this ambiguity that appears in the contract concerning the necessity of these consents being obtained?

Mr. Abbott: I object to the form of the question, your Honor.

The Court: Sustained. [385]

Q. (By Mr. Nelson): What was the intent of the district at the time that it signed this agreement concerning the acquisition of these consents and waivers?

Mr. Abbott: We object on the ground that the parol evidence rule obtains with respect to varying the terms, which are clear and unequivocal, your Honor.

The Court: Overruled. You may answer.

The Witness: It was the intent of the board of trustees at that time, and since that time never to agree or to think or be interested in parting with this aircraft unless all governmental restrictions were removed, and that is true regardless of how the interpretation of this contract is made by whoever wishes to read it; that the intent of the board was and still is never to part with that aircraft until all governmental restrictions were released.

Q. (By Mr. Nelson): And is that the understanding, your understanding of the wording, where it says, "notwithstanding any other provisions of this agreement"?

A. That seems very definite.

(Testimony of Peter A. Bancroft.)

Q. Did the board of trustees ever give the defendants Finn a bill of sale to the subject aircraft? A. No, sir, they did not.

Q. Did you give a bill of sale to the defendants Finn to the subject contract?

A. Yes, sir. [386]

Q. Did you talk it over——

The Court: The answer is yes?

The Witness: Yes, sir.

The Court: You personally gave it?

The Witness: I personally gave it, yes, sir.

The Court: It was executed by you?

The Witness: Yes, sir.

The Court: Where is it?

Mr. Nelson: It is in evidence, your Honor.

The Court: What exhibit is it?

Mr. Blackman: It is a part of International's Exhibit A, your Honor.

The Court: Very well.

Q. (By Mr. Nelson): Did you talk this matter over with your board of trustees at the time you gave this bill of sale, Mr. Bancroft?

A. Yes, sir, I did.

Q. Was it at a formal meeting or an informal meeting?

A. Well, I don't even recall if it was at a meeting. We were together, and discussed it, but whether it was—it was not a formal meeting.

Q. And was it their determination that you go ahead and give the bill of sale?

(Testimony of Peter A. Bancroft.)

A. Yes, sir, it was.

Q. Could you say it was at a regular meeting of the [387] board?

Mr. Abbott: I object, your Honor. That calls for a conclusion of law. Regularity involves a number of things under the statute.

The Court: It is a conclusion, but I think it is a conclusion that is entitled to be drawn by this witness. Overruled.

The Witness: Will you repeat the question?

The Court: Was it at a regular meeting or a specially called meeting?

The Witness: As to our meetings, we have two types of meetings.

The Court: Is that an answer?

Mr. Nelson: Not exactly, in that it is possible to have a specially called meeting, which is still a legal meeting.

The Court: You are not referring to legality. You are referring to regularity.

Q. (By Mr. Nelson): I might ask this: Was it a regular meeting or a special meeting called for that purpose? A. No, sir, it was not.

The Court: What do you mean by that? It was not a regular meeting?

The Witness: Your Honor, as has been suggested,——

The Court: I just don't understand your answer. The question was, as I understood it, was it this or that, and [388] you answered, "No."

(Testimony of Peter A. Bancroft.)

The Witness: We have three types of meetings.

The Court: You don't need to go into that with me. I just don't understand your answer to the question. If counsel does, and is satisfied, that is enough.

Q. (By Mr. Nelson): Do you recall approximately where this meeting took place?

A. At the Sunset School.

Q. Were all board members present at the time?

A. Yes, sir.

Q. Was it at the time that you had a regularly, duly authorized meeting? A. No, sir.

The Court: Then you would call it a special meeting, wouldn't you, Mr. Bancroft?

The Witness: No, your Honor. There are two technical terms. There is a regular meeting, which is posted once a month at a regular time and place. A special meeting may be called by the board of trustees, with notice of 24 hours in advance; or there can be a meeting that might be termed special, but not entitled that, because the group could get together at any time for discussion purposes.

The Court: That might be an extra special meeting?

The Witness: It could be, yes, sir.

Q. (By Mr. Nelson): Was the public invited at this [389] meeting?

A. No, sir, they were not.

Q. You have had an opportunity to review your minute books, have you not? A. Yes, sir.

Q. At my request, did you search those books for

(Testimony of Peter A. Bancroft.)

a minute order indicating the authorization to you from the district to give this bill of sale?

A. Yes, sir.

Q. Did you find that authorization in the minute book? A. There was no such authorization.

Mr. Abbott: I will object to the answer, your Honor, unless the witness indicates whether he is indicating written permission, as a result of the search, or an oral authorization. I think it is ambiguous on that point.

Q. (By Mr. Nelson): Would you confine your answer to a written authorization?

A. Yes, sir. We were referring to the minute book, and I would assume that would mean written permission.

Q. We have already covered the point that you did get an okay from the board at an informal meeting? A. Yes, sir.

The Court: Did that include all members of the board of trustees?

The Witnes: Yes, sir.

The Court: All signified their agreement that you execute [390] this bill of sale?

The Witness: Yes, your Honor.

Q. (By Mr. Nelson): Where was the plane located when the agreement between the defendants Finn and the district was signed?

A. At Sunset School.

Q. How long did it remain there after the agreement was signed and until it was removed?

A. It remained there continuously.

(Testimony of Peter A. Bancroft.)

Q. How long?

A. Now, we are back to dates again. I believe the agreement was signed in February of 1951, and the plane was flown away in the fall of '51.

Q. Did the Finns remove it at that time?

A. When the plane——

Q. When it was flown away, was it the Finns that removed the aircraft? A. Yes, sir.

Q. Do you know why the Finns hadn't removed it prior to this period of time elapsing?

A. Yes, sir. There were a number of reasons. One of them was that, I believe, the restrictions had not been removed; at least, that is what we were told. We were still using it as a classroom. We wished to continue to use it right up until May so that we would not interfere with the [391] current school year, and, of course, subsequently, after that there was a considerable period of time needed to prepare the plane for flight, because it was in pretty bad condition.

Q. Do you know the purpose for which the Finns removed the plane?

A. Yes. They told me at the time that there were a number of steps to be taken. One, that they would have to remove the restrictions. Two, they would have to prepare the plane for flight upon the time that these restrictions would be removed. They did all the work that they could at our school site, but, obviously, as has been testified, it would take a lot of additional work to license that aircraft, and they felt

(Testimony of Peter A. Bancroft.)

that it would be a considerable additional cost to them if they must transport men and materials from Los Angeles to our school to complete this work, and the reason that they at this time wished to fly the plane to Los Angeles was to complete this work at a considerable saving to them, and we had no objection to that.

Q. Did the board demand that the consents be shown before they allowed the aircraft to be taken by the Finns at that time? A. Yes, sir.

Q. And did the Finns make such a showing, or such a statement?

A. Yes, sir. They said they had received the necessary [392] releases from Washington, and, of course, we were all curious as to what they were, and we were shown, I believe, the CAA—I am not positive whether it was a registration form or the flight permit which we were shown, one or the other, if not both, and given the assurance that those could not be obtained unless the necessary releases had been given.

Q. And was it your belief, your personal belief that these releases had been obtained at that time?

A. Yes, sir, it was.

Q. Was the plane to be brought back, if necessary?

A. That was a very definite agreement with the Finns, and it was our understanding—the board's understanding and mine, in addition, that at any time if the clearances were not made, or the full

(Testimony of Peter A. Bancroft.)

terms of the contract were not met with the district, that the plane would be returned. In fact, I think the Finns went far enough to state that not only would they use every possible means at their disposal to satisfactorily complete the contract with us, but they also stated that at no time would they ever cause embarrassment to the Vineland School District, and if such embarrassment arose, or if the contract was not met, the terms of it, or if the releases were not obtained, that the plane would be returned to the district, and there would be absolutely no strings attached to it whatsoever.

Q. Would you personally have allowed this aircraft to [393] be removed at the time it was if you had any idea that it would not be returned, and the restrictions had not been removed?

A. I certainly would not.

Q. Who told the Finns that it could be flown away? Who was the one that made the personal contact? A. I did.

Q. Did you talk it over with your board of trustees before you allowed the physical possession to be taken in this manner?

A. Yes, sir, I did.

Q. Was that at a formal meeting of the board?

A. No, sir.

Q. Was it open to the public?

A. No, sir, it was not.

Q. Did the board give you the okay to allow the possession to be taken?

(Testimony of Peter A. Bancroft.)

A. Yes, they did. I might state in addition to that that there may be some thought as to why these informal meetings were held.

We held a number of meetings to discuss this plane, and I think it is fairly evident that a regular meeting entails considerable additional preparation, and these trustees are non-paid, and they have businesses of their own to take care of, and so I make every attempt as district superintendent [394] not to impose upon their time, and yet to handle the business of the district so at all times when we meet, we meet just as fast as we can, go ahead into discussion, and an agreement, and then that is done, whereas if we had to have a formal board meeting, advertise it in advance, and the rest of it, it could not only not be done at the moment, but it takes more preparation and more of their time.

Q. Mr. Bancroft, did the board intend, with your knowledge of their functioning and from being present at their meetings, and was it your personal belief and intent that this aircraft was to be transferred in any form whatsoever, without all the conditions being performed, and all the consents being obtained?

A. That was never the intent of the board, nor of me.

Mr. Nelson: No further questions.

The Court: Mr. Clerk, will you place Vineland's Exhibit—no, it is International Airports' Exhibit A before the witness?

(Testimony of Peter A. Bancroft.)

(The document was placed before the witness.)

The Court: Mr. Bancroft, is the document there entitled, "Bill of Sale," is that that bill of sale which you signed in favor of the defendants Finn on behalf of the Vineland School District on February 28, 1951? A. Yes, sir, it is.

Q. Is that the bill of sale which you state the various [395] members of the board of trustees of the Vineland School District authorized you to sign as superintendent?

The Witness: Yes, sir, it is.

The Court: Was that authorization which you say was given you, given you at a meeting or gathering of all the members of the board of trustees of the Vineland School District?

The Witness: Yes, sir, it was.

The Court: They were all present at the same time, were they?

The Witness: Yes, sir.

The Court: And did they discuss this matter?

The Witness: Yes, sir.

The Court: Did all of them in your presence indicate their agreement that you sign this bill of sale on behalf of the School District?

The Witness: Yes, sir.

The Court: Any further questions of Mr. Bancroft?

Mr. Blackman: I have some, your Honor.

(Testimony of Peter A. Bancroft.)

Cross-Examination

Mr. Blackman: Mr. Clerk, do you have Vineland's Exhibit E, please?

The Court: That is an agreement which apparently is attached as Exhibit A, to the answer. [396]

Mr. Blackman: That is Exhibit E. That was the exhibit that the witness was asked about, and then Mr. Nelson went no further with it. I believe that is a Government document.

The Court: According to the list—it should be brought up to date, Mr. Abbott—Exhibit E——

Mr. Blackman: Yes, sir.

The Court: You are referring to International's Exhibit E?

Mr. Blackman: No, Vineland's Exhibit E, your Honor, as to Administration Instructions of Office of Aircraft Disposal, Educational Aircraft Disposal Division, Washington, D. C.

Mr. Nelson: That is the one I just gave you, Mr. Clerk. It is over on the corner of your desk.

(The document was handed to counsel.)

Q. (By Mr. Blackman): Mr. Bancroft, Mr. Nelson called your attention to Vineland's Exhibit E in evidence, paragraph 2 of which reads as follows:

> "Distribution under this plan will be confined to aeronautical property which has been determined by the disposal agency to be commercially unsalable by reason of its condition resulting from wear, tear, obsolescence, or otherwise, has

(Testimony of Peter A. Bancroft.)

> no reasonable prospect of sale except as scrap, or with respect to which by reason of its large supply or prior use the estimated cost of care, handling [397] and disposal will exceed the estimated proceeds unless it is promply sold as scrap, or with respect to which the estimated cost of care, handling and disposal will exceed the estimated proceeds as scrap, or othewise."

Mr. Blackman: Mr. Clerk, will you lay this before the witness, Exhibit E?

> (The document was placed before the witness.)

Q. (By Mr. Blackman, continuing): Was the District aware of those instructions at the time that it applied for the C-46 in suit?

A. I wouldn't say that they were aware of these particular ones, but they knew of them, and we had discussed the condition of these aircraft, and their value to the Government, yes, sir.

Q. Were you aware of it, sir.

A. I would make the same statement on it, that we were aware of the condition of these aircraft, and of their value, and the fact that they were sold to a district that cheap, that there were reasons for it, yes, sir.

Q. Was your application on behalf of the district for the transfer of this C-46 based upon the information which you had gathered out of that Government publication before you, Exhibit E?

A. Partly from the exhibit, but also from, I

(Testimony of Peter A. Bancroft.)

think, [398] general knowledge at the time of the value or war surplus equipment, that the Government was anxious to get rid of this equipment, and that it had very little value.

Mr. Abbott: I will object to the conclusions of the witness as to the Government's intentions, or the value of surplus equipment in general, your Honor.

The Court: Is there any issue as to that?

Mr. Blackman: I don't believe so, your Honor. I didn't really intend the purport of my question to call for that answer.

The Court: Very well.

Mr. Abbott: May the remarks to which the objection is addressed be stricken, your Honor?

The Court: Yes, unless some party wishes the court to take judicial notice, as a matter of common knowledge.

Mr. Blackman: I believe it is written into the Act, your Honor.

The Court: Do you oppose the motion to strike?

Mr. Blackman: On that basis, I will oppose the motion, your Honor.

The Court: Motion denied.

Mr. Abbott: In connection with the judicial notice, we have presented, and will present additional evidence, as to the very type aircraft in suit. Mr. Duly has testified as to the type and prices received for the aircraft, and he said that [399] we were asking a price of $25,000, and it was reduced to five, and we were able to sell them at five.

The Court: In 1946?

(Testimony of Peter A. Bancroft.)

Mr. Abbott: He said the asking price in 1946 was 25,000, and by lowering the price to five they were able to dispose of some of them.

The Court: Were you referring to commercial value in the market, Mr. Bancroft?

The Witness: I was referring to general value, as we understood it, because I visited the field where these aircraft were, and even the representatives there said, "Well, we are glad to see one more go, because we are sure stuck with them."

The Court: I had thought it was a matter of common knowledge at the time that the Government was anxious to dispose of these aircraft as surplus.

Mr. Abbott: Unquestionably, your Honor. Unquestionably the market was depreciated because of the large stock, but they still had commercial value, and were sold commercially at certain figures.

The Court: The witness said they had little value.

Mr. Abbott: And he was going on to state the Government's intentions in the matter.

The Court: As he understood them.

Mr. Abbott: And as to the fair state of the market, as [400] to which I don't think he is qualified.

The Court: As he understood them.

Mr. Abbott: He has not been qualified as an expert in this field, your Honor, and we have had an expert give evidence on the very point.

The Court: Of course, his state of mind is in issue here. Motion denied. Put your next question.

Q. (By Mr. Blackman): Mr. Bancroft, when

(Testimony of Peter A. Bancroft.)

the district entered into the contract, Vineland's Exhibit B, with the Finns, had Vineland's legitimate need for this particular aircraft been fulfilled?

A. No, sir, it had not.

Q. All right. Assuming that the contract, Exhibit B, was complied with, would Vineland's legitimate need for this aircraft have been fulfilled?

A. No, sir. The one in suit, but not the needs for a similar aircraft.

Q. That was really the question that I asked you. Perhaps I didn't make myself clear. I am speaking now about the aircraft in suit, and I will ask you whether or not at the time that Vineland signed the contract with the Finns, Exhibit B, had Vineland's legitimate needs for the aircraft been fulfilled—that particular aircraft?

Mr. Abbott: Objection, your Honor. That is immaterial. Plaintiff's Exhibit 1, Form 65 agreement, provides that it [401] must be unsuitable for any legitimate use, and the witness has testified this plane was suitable for further educational use.

The Court: Is this directed to the witness' state of mind?

Mr. Blackman: Your Honor, it is.

The Court: The question is on a breach of contract, and that is the reason I have ruled as I have with respect to his state of mind. The Government has charged this defendant with interfering with the advantageous contractual relationships. Is that correct?

(Testimony of Peter A. Bancroft.)

Mr. Abbott: The amended complaint so states, your Honor, although we have asked leave to amend to show in lieu of that charge the charge of conversion of property of the United States, as to which it had the right of possession.

The Court: The objection is overruled.

Mr. Blackman: Will you read the question, Miss Reporter?

(The question was read.)

The Witness: No, sir, they did not.

Q. (By Mr. Blackman): And assuming that Exhibit B had been complied with, then in that event would Vineland's legitimate needs for the aircraft have been fulfilled? A. That is correct.

Mr. Abbott: I will object to the question in that form. It is not addressed to the witness' intention or state of [402] mind. It is wholly immaterial as a fact. If, under the court's ruling, the state of mind is material, the question should be so framed.

The Court: It is relevant perhaps indirectly to that issue. Overruled. The answer may stand.

Q. (By Mr. Blackman): The substitute aircraft, Mr. Bancroft, the one which is not in suit, is that presently located at Vineland School?

A. Yes, sir.

The Court: By "substitute aircraft," do you mean the aircraft which the defendants Finn provided under this agreement?

Mr. Blackman: Yes, your Honor.

The Court: The agreement being Exhibit——

(Testimony of Peter A. Bancroft.)

Mr. Blackman: Exhibit B.

The Court: Vineland's Exhibit B?

Mr. Blackman: That is right.

The Court: Did you so understand it?

The Witness: Yes, sir. Yes, your Honor.

Q. (By Mr. Blackman): And is that substitute aircraft available to Vineland for substantially the same use and purposes as the aircraft in suit?

A. No, sir, it is not. It is at our site, but there is considerable work under the contract that was to be done to this aircraft, which has not been done, and even though [403] the plane is there, it is not in the same condition as we want it, or that it should be.

Q. But it is available for whatever work is required to be done, in order to fit it for the same purpose, is it not? A. Yes, sir, it is.

Q. And such work can be done on the aircraft, can it not? A. Yes, sir.

Q. And such work is the type of work that is provided in the contract which the district signed with the Finns, Exhibit B? A. Yes, sir.

Q. And there is nothing to prevent that work from being done excepting the Finns doing it or Vineland doing it; isn't that true?

A. That is correct.

Q. And as far as you know, Mr. Bancroft, up until October, 1951, did the school district do everything that it was supposed to do under its contract, Exhibit B? A. Yes, sir.

Q. And when you released the airplane to the

(Testimony of Peter A. Bancroft.)

Finns, as you have testified, upon the permission given you by the board of trustees, so far as you were concerned the Finns had obtained the releases that you contemplated and the board [404] contemplated by their contract, Exhibit B; is that true?

A. That is correct.

Q. In other words, at that time you released it for all purposes, didn't you? I am speaking only at that time?

A. Well, we still hadn't consulted our counsel, and we had made an effort to, and so we had a reservation in our own thinking. We felt that the releases had been obtained, because that is what we had been told, but at the same time, as you can understand, when a contract is not complete, you have some worry about it, and in releasing the plane we felt, and so instructed the Finns, and they agreed, that when it was taken to Los Angeles that there would be nothing done there, or it would not be taken anywhere else, so that it would in any way sever the contract which we had with them, and which so stipulated, that the Government releases must be obtained. [405]

Q. But you had no reason to believe, in your own mind, that the Government releases had not been obtained? A. No, sir.

The Court: How far in miles is it from your school to the county counsel's office in Bakersfield?

The Witness: About 17 miles, your Honor.

Q. (By Mr. Blackman): Is there a telephone between your school and the county counsel's office?

(Testimony of Peter A. Bancroft.)

A. Yes, sir. I might add to that, not only did I phone, but I made two trips into the county counsel's office to obtain counsel, and I believe the counsel was out of the county at the time, at least not in his office, at both times.

Q. That was before you did what?

A. It was before we gave, I guess you would say, permission to remove the airplane.

Q. And had the airplane been used by the school for any purpose from and after the beginning of summer vacation, 1951?

A. I believe we used it for storage; but not as a classroom.

Q. And were the Finns in and upon the airplane during the period of time commencing with that vacation?

A. They appeared at times for inspections; but not continuously.

Q. I see. And was there any effort on your part to limit their right of access to the airplane? [406]

A. No, sir. We had agreed to that.

Q. Mr. Bancroft, have you, before coming into court here, ever heard of the Heddleston plan by name?

A. I heard of Mr. Heddleston, and wrote to him a number of times, but as far as hearing of a Heddleston plan, I believe this is the first reference to that.

Q. And before this lawsuit was commenced, had you ever heard of War Assets Form 65 by that name?

(Testimony of Peter A. Bancroft.)

A. I had never heard reference to it by that name, no, sir.

Q. Had you ever heard reference to it by any name other than knowing about a scrap warranty clause, which your signed agreement, which contained such a clause?

A. Well, I thought of this——

Mr. Nelson: I object to the question as being compound and a little difficult to answer. Perhaps it can be broken down.

Q. (By Mr. Blackman): Well, did you ever hear of Form 65 agreement by any name?

A. Not any other than just an agreement form; but not by any title, as such.

Q. I see. In other words, my question is this: Had this agreement been given any publicity, as far as you know in your mind, other than the fact you simply signed an agreement, an agreement at a date—— [407]

Mr. Abbott: Your Honor——

Mr. Blackman: May I finish?

Q. (By Mr. Blackman): ——at a date prior to the time that the school acquired the C-46 aircraft in suit?

Do you understand the question, sir?

A. I believe so.

Mr. Abbott: We will object to the question. The witness' knowledge of publicity of a particular form is not material to any issue here.

(Testimony of Peter A. Bancroft.)

The Court: Whether he heard of it—what is the purpose?

Mr. Abbott: He actually signed the form.

The Court: You are referring now to Plaintiff's Exhibit, or Government's Exhibit 1 here, are you not?

Mr. Blackman: Yes.

The Court: Which is a form, WAA Form 65, is that correct?

Mr. Blackman: Yes, sir.

The Court: What is the purpose whether or not he knew it by some name that they called it in Washington or not?

Mr. Blackman: Whether he heard of any publicity given to this form, other than he——

The Court: What difference does it make? It seems to me it is immaterial.

Mr. Blackman: Very well. Thank you.

Q. (By Mr. Blackman): Now, when the Finns told you that [408] they would like to take the airplane down to Los Angeles to have additional work done on it—I believe your testimony was to license it—did they tell you whether they intended to do the work themselves or have somebody else do it.

A. I don't recall whether they said definitely or not, because they had done most of the work at that time themselves, and as I recall the discussion was that the cost was becoming very great because of hauling materials and the probability of getting some specialist at the school there, and that is the reason they wanted to take it down. So whether they

(Testimony of Peter A. Bancroft.)

actually said they were going to do it themselves or not, I don't recall.

Q. But the item of cost did figure in the conversation you had with the Finns, as to the reason they wanted to take it down to Los Angeles?

A. Yes, it did.

Q. And you and the District were aware that the Finns did intend to license the airplane and that would require the performance of additional work being done on it, is that right? A. Yes, sir.

Q. As far as the District is concerned, Mr. Bancroft, up until the time that the Government instituted its suit in 1952, July 3rd, I believe, 1952, had the District ever served any notice of default or any similar document on the Finns [409] with respect to this contract, Exhibit B?

A. No, sir. The time limit of the agreement terminated and at that time it was renewed to the mutual consent of both parties because the Finns had made a number of statements of actions that they would do. We never saw any evidence to the contrary that they would not perform them. In fact, they made every effort to see that the conditions of the contract were met. But they ran out of time. And so we extended it. But we didn't notify them in writing, or anything like that.

Q. And when the question of title was raised by the Government in its suit of July 3, 1952—that's the pending suit—had the Finns shortly before that time, to your knowledge, flown the aircraft back to Bakersfield and notified you of that fact?

(Testimony of Peter A. Bancroft.)

A. I am not certain as to times, but when it was flown back to Bakersfield, we were so notified.

Mr. Blackman: I have no further questions of the witness.

Mr. Nelson: If the court please, I would like to be heard at this time on a motion, if I may, in light of comments which have come from Mr. Abbott when Mr. Blackman first took on this witness.

The Court: I will hear you later. Let's finish the examination of the witness.

Mr. Nelson: All right, your Honor. Very [410] well.

Q. (By Mr. Abbott): Now, Mr. Bancroft, you have testified that it was your intention to secure some other airplane in lieu of the airplane in suit so that the School District would still have a classroom to use for the children. Now, isn't it true, sir, that in the fall of 1950 there were two C-46A airplanes on the School District premises? A. Yes, sir.

Q. And one of them is the airplane in suit and the other one is 42-96563 Air Force serial number, is that not so? A. Referred to here as the hulk?

Q. Well, does the term "hulk" to you mean Air Force serial No. 42-96563, C-46A?

A. No, sir, it does not. It means to me the one that is not in suit, of the two airplanes.

Q. You don't know the serial number of the airplane not in suit? A. No, sir.

Q. Now, you have told the jury that in the arrangements leading up to the execution of Vineland's Exhibit B, the agreement dated February 28,

(Testimony of Peter A. Bancroft.)

1951, you contemplated that an airplane would be furnished by the Finns to use for educational purposes. Wasn't that, in fact, the airplane that you already had on your premises, Mr. Bancroft?

A. Mr. Abbott, that airplane had previously been sold [411] to the Finns and was not our airplane.

Q. Had previously been sold, Mr. Bancroft?

A. Yes.

Mr. Abbott: Counsel have already inspected the document I am handing to the clerk to be marked for identification. I ask that there be marked as Government's Exhibit next in order a bill of sale, purportedly from the Vineland Elementary School District, to Charles C. Finn and George C. Finn, dated March 28, 1951.

After marking the exhibit, will you place it before the witness, Mr. Clerk?

The Court: I haven't an up-to-date list of the Government's exhibits, so I don't know what exhibit number it is next. But whatever it is——

Mr. Abbott: That is No. 12, your Honor.

The Clerk: No. 12.

(The document referred to was marked Plaintiff's Exhibit 12 for identification.)

Q. (By Mr. Abbott): Will you examine that document, Government's Exhibit 12 for identification, Mr. Bancroft? A. Yes, sir.

Q. Is what purports to be the signature on that document, in fact, your signature?

(Testimony of Peter A. Bancroft.)

A. Yes, sir.

Q. Did you place your signature on the document on the [412] date which it bears?

A. Apparently I did.

Mr. Abbott: We offer that document in evidence, your Honor. And I would like permission to read a portion of it to the jury.

The Court: By "that document," I take it you refer to——

Mr. Abbott: Government's 12 for identification, your Honor.

The Court: Received in evidence.

(The document referred to, marked Plaintiff's Exhibit 12, was received in evidence.)

Mr. Abbott: Ladies and gentlemen, I will read, in part, from the document described as Government's Exhibit 12, entitled "bill of sale."

> "In consideration of $10 and other good and valuable considerations, the undersigned, owner of the full, real and beneficial title of the aircraft described as follows, C-46A Curtiss-Wright, Serial No. 42-96563, C.A.A. registration No. 111-E, this 28th day of March, 1951, hereby sell, grant, transfer and deliver all of his right, title and interest in and to such airplane unto Charles C. Finn and George C. Finn."

Q. (By Mr. Abbott): Does that document, sir, describe [413] the particular airplane which the

(Testimony of Peter A. Bancroft.)

School District was to receive under the terms of the Vineland's Exhibit B?

A. If that's the C-46 that is not in suit, then I would assume it is.

Mr. Abbott: Mr. Clerk, will you place the document before the witness, again?

The Court: What is "the document"?

Mr. Abbott: Government's Exhibit 12.

The Court: Refer to it by exhibit number, if you will, Mr. Abbott, and save us a great deal of time and effort.

Mr. Abbott: I will be happy to, your Honor.

The Witness: Well, there is a serial number here, and I assume that is the one that is not in suit. That is my reference——

Q. (By Mr. Abbott): Well, in all, for the entire period that you have been superintendent of the Vineland Elementary School District, how many C-46's have been owned by that District?

A. Two C-46's, the one in suit and the other one.

Q. Does the document, Government's Exhibit 12, refer to the aircraft in suit?

A. It doesn't say so.

Q. Now, Mr. Bancroft, you have no doubt as to which of the two aircraft that document applies to, do you, Government's Exhibit No. 12? [414]

A. Mr. Abbott, I am not trying to be difficult here. I merely don't remember the serial number of the plane. And if you know this is not the plane in suit, maybe you could assist me.

(Testimony of Peter A. Bancroft.)

Q. Well, is the serial number, Air Force No. 42-3645?

A. That is not this serial number.

Q. Is the serial number 42-3645 the serial number of the aircraft in suit?

A. I believe it is, sir; but not the one on this bill of sale.

Q. Yes. To which C-46A does the bill of sale, Government's Exhibit 12, apply?

A. I assume that it is the other aircraft.

Q. What was your particular intention as to the particular aircraft which you were transferring when you signed Government's Exhibit 12?

A. It would be for the aircraft not in suit.

Q. Which aircraft has been described in this record as a hulk? A. The one not in suit.

Q. Yes. And is that the aircraft which you intended to receive for the School District and to use as a schoolroom in lieu of the aircraft in suit?

A. Yes, sir, it is.

Q. Now, will you please explain to the jury how it [415] happens that a month after the execution of Vineland's Exhibit B—and may that be placed before the witness so there is no confusion—you executed a bill of sale to the Finns for the aircraft which you were to receive as a new schoolroom?

A. That matter of title and bill of sale keeps coming up, and that isn't my business. It is my understanding that the Finns—that we had given them title to this plane prior to the contract. Apparently——

(Testimony of Peter A. Bancroft.)

The Court: By "this plane," you are referring to the hulk?

The Witness: The hulk, yes, your Honor. Maybe written evidence of that, in the technical form, a bill of sale, had not been issued, and that was done at the later date.

The Court: If I understand what you say, at the time of Vineland's Exhibit B, the agreement of February 28, 1951, it was your understanding that the hulk had previously been sold to the defendants Finn——

The Witness: Yes, your Honor.

The Court: And was their plane, so to speak?

The Witness: Yes, your Honor.

The Court: And that that's the reason it is dealt with in the agreement?

The Witness: Yes, your Honor.

The Court: Exhibit, Vineland's Exhibit B. [416]

Q. (By Mr. Abbott): So there after you gave a bill of sale to the Finns on the aircraft in question, on a C.A.A. bill of sale form, which is Government's Exhibit 12, with the intention of confirming the prior title, Mr. Bancroft?

A. That must have been it.

Q. Were you told by the Finns that they intended to seek Civil Aeronautics Administration registration of the aircraft not in suit in their own names?

The Witness: Would you repeat that again?

Mr. Abbott: Will the reporter read it back, please?

(Testimony of Peter A. Bancroft.)

(The question was read.)

The Court: You are referring to the hulk, now, are you?

Mr. Abbott: I am, your Honor.

The Witness: I don't ever recall that statement. They did tell us that they were going to fly the plane, and that seemed quite ridiculous to us because of the condition. But they did assert that they were going to put the plane in condition to fly it, at the time we sold——

The Court: When was that time?

The Witness: Prior to the contract.

The Court: How long prior? Months or weeks?

The Witness: Probably months, your Honor.

The Court: Probably a month?

The Witness: Months; plural.

The Court: Well, how many? [417]

The Witness: How many? Several.

The Court: Let me see if I get the chronology straight. Several months before you purported to sell the plane in suit to the Finns, defendants Finn, that is, several months before you made the agreement of February 28, 1951, Vineland's Exhibit B, to the defendants Finn, you previously sold them the hulk, had you?

The Witness: Yes, your Honor.

The Court: For how much?

The Witness: Well, it was a combination cash and material exchange. [418]

The Court: So when you made Exhibit B, the

(Testimony of Peter A. Bancroft.)

agreement, with respect to the plane in suit, a part of that agreement was to get the hulk; is that it?

A. Yes, sir.

The Court: To use as a classroom?

The Witness: Or as the contract states, any other suitable aircraft, or any better.

Q. (By Mr. Abbott): Now, if on March 28th you gave a bill of sale to the Finns, for the hulk, did you then take back a bill of sale to perfect the title to the School District, pursuant to Vineland's Exhibit B, the agreement of February 28, 1951?

A. I don't believe at that time we did, because that would be contingent as one of the parts of the contract, and there were many parts that had not been met.

The Court: Did you get the possession of the hulk?

The Witness: Yes, we had possession of the hulk.

Q. (By Mr. Abbott): The hulk had never been off the school grounds, had it, Mr. Bancroft?

A. Yes, it had.

Q. Where had it been?

A. The Finns moved the hulk off of our property, and I believe it was on a neighboring piece of property, and at the time they returned it to us, it was put back on our property, and in a position to use there. [419]

Q. Now, did Mr. Finn tell you that at the time that you executed Government's Exhibit 12, the CAA bill of sale, that it wanted a CAA bill of sale

(Testimony of Peter A. Bancroft.)

on the hulk, in order to secure CAA registration of that airplane?

A. No, sir, I don't remember that at all.

Q. Did he tell you at a later date that he in fact secured CAA registration of that airplane?

A. No, sir.

Q. Did you ever give your consent to CAA registration of that airplane by Mr. Finn?

A. I don't recall any reference to CAA registration.

Q. Would you have given your consent to CAA registration of the hulk in the name of the Finns after February 28, 1951?

Mr. Blackman: I object to that as immaterial to any issue in this case.

Mr. Abbott: Counsel has gone into the witness' state of mind.

The Court: Overruled.

Mr. Nelson: May I object to that as being irrelevant and immaterial, for the record?

The Court: Overruled. He may answer, and then we will take the morning recess.

The Witness: Would you rephrase the question, please?

Mr. Abbott: The reporter will read it, and if it is [420] not clear, I will rephrase it.

(The question was read.)

The Court: By that you mean after the agreement, Exhibit B?

Mr. Abbott: That is correct, your Honor.

(Testimony of Peter A. Bancroft.)

The Witness: Well, to my knowledge, I have never given any permission. I don't see——

The Court: The question is, would you? If it had been requested of you after you made the agreement, Vineland's Exhibit B, would you have given permission thereafter——

The Witness: Your Honor——

The Court: ——to the defendants Finn to register the title of that plane, the hulk, in themselves?

The Witness: Pardon me, your Honor. These are matters that I don't understand, and whether I would or would not, I have no way of knowing. As a school superintendent in charge of educational matters, I am not aware of whether I would have to or would want to give permission for a CAA registration. That I don't understand.

Q. (By Mr. Abbott): You intended to use that hulk after February 28, 1951, as a classroom?

A. That is correct.

Q. For an indefinite period?

A. That is correct.

The Court: You were willing to leave the law to the [421] lawyers, were you not?

The Witness: That is correct, your Honor.

The Court: We will take the morning recess at this time.

You are excused for five minutes, ladies and gentlemen, subject to the usual admonition.

You may step down.

(Thereupon the jury retired from the courtroom.)

The Court: Did you have some matter, Mr. Abbott?

Mr. Abbott: No, your Honor. I was just remaining here until the jury left.

Mr. Nelson: If your Honor please, I had in mind making my motion in the absence of the jury.

The Court: Very well. Is it stipulated, gentlemen, that the jury has left the courtroom?

Mr. Abbott: So stipulated.

Mr. Blackman: So stipulated.

Mr. Nelson: So stipulated.

If it please the court, we respectfully submit a motion at this time, in the light of comments made by Mr. Abbott, wherein he stated that in lieu of the inducement action in this case, that they were to amend their cause of action to state a conversion.

Inasmuch as the Government is apparently willing now to drop completely this inducement action and replace it by using [422] the words, "in lieu," we move that the action for inducing breach of the contract against Mr. Bancroft be dismissed.

The Court: The motion will be denied at this time, without prejudice to a renewal of it at a later date, and if so advised.

Mr. Nelson: Very well, your Honor.

The Court: Since the Government was not willing to discontinue the action voluntarily, we will complete the trial on the issues as framed at the beginning of the trial. Then there may be motions, if counsel are so advised, to amend to conform to the proof.

Mr. Nelson: If your Honor please, I wonder if

(Testimony of Peter A. Bancroft.)

I could impose on the court with a motion, then, to dismiss this action which is being interposed by the Government on conversion.

The Court: At the close of all evidence, you may.

Mr. Nelson: Yes, your Honor.

The Court: We will recess for five minutes.

(A short recess.)

The Court: Let the record show the jury is present in the case on trial.

Do you wish to examine Mr. Bancroft further?

Mr. Abbott: If I may, your Honor.

(The witness resumed the stand.)

Q. (By Mr. Abbott): Mr. Bancroft, do you have before you Vineland's Exhibit B? [423]

Mr. Abbott: If not, will the clerk place it before the witness, please?

(The document was placed before the witness.)

The Witness: Thank you. Yes, sir.

Q. (By Mr. Abbott): In paragraph 3 of that document, which you have previously seen, there is a description of a number of items of property and services to be provided by the Finns as partial consideration for the purchase of the airplane in suit. Did you and the Finns have any discussions as to the total reasonable value of all of those items of material and services? A. No, sir.

Q. Did you in your dealings with the board of trustees place any value thereon?

(Testimony of Peter A. Bancroft.)

A. No, sir. We just listed the things that we wanted, and thought it would be a fair exchange.

Q. At the bottom of page 3, Subparagraph 5, there is a provision for a performance bond in the amount of $2100. How was the amount of that bond determined?

A. Well, these pages are mixed up, Mr. Abbott.

Q. This is Subparagraph 5 of III of Vineland's Exhibit B, Mr. Bancroft.

A. Yes, I have it. Well, I suppose that is some legal arrangement to guarantee the contract. [424]

Q. Does that represent any particular percentage of the total consideration, Mr. Bancroft?

A. I believe in testimony yesterday by the Finns, I recall that it was 10 per cent.

Q. Well, is that your recollection of the manner of fixing that amount?

A. Wasn't at the time, no, sir.

Q. Do you have an opinion as to the reasonable value of goods and services to be received pursuant to Roman numeral III, Vineland's Exhibit B?

Mr. Nelson: Objection, your Honor, as irrelvant, incompetent and immaterial; doesn't seem to tie into this case or even his mental state; and certainly he is not an expert witness for these proceedings.

Mr. Abbott: I believe it is material two ways, your Honor; one, on the question of value of the aircraft at the time; and the second point is one which relates to cross-examination of the witness, and I will tie it in with later questions.

(Testimony of Peter A. Bancroft.)

The Court: Overruled. You may answer.

The Witness: I don't recall any percentage or formula for basis of this $2100.

Q. (By Mr. Abbott): The present question, Mr. Bancroft, is, do you have any opinion as to the present reasonable value of the goods and services which the Finns were to supply pursuant to Roman numeral III of Vineland's Exhbit B. [425]

A. Do I have at this time, or the time of the agreement.

Q. On either occasion.

A. I don't have one for either time. I probably have a better estimate of the value now than at that time. We didn't go into——

Q. What is your present estimate?

Mr. Blackman: Just a minute. I don't think his present estimate is material. I object to that.

Mr. Abbott: I make the same statement as before.

The Court: Overruled.

Mr. Nelson: For the record, your Honor, may our objection join with Mr. Blackman's; also calling for an opinion and conclusion of the witness.

The Court: Overruled. You may answer.

The Witness: What I meant to say, at the time I had no estimate of the value. At the present time I have a general idea, but I could not state a specific amount. I never tabulated these items; never investigated thoroughly their cost, and I don't know what they are worth, as far as deterioration.

Q. (By Mr. Abbott): With all those qualifica-

(Testimony of Peter A. Bancroft.)

tions, what is the general impression you have now?

A. I have no impression as far as total value, because I never added them, never totaled them.

Q. Did you, in negotiating with the Finns, have in mind the value to the School District that they would provide in [426] doing the work and furnishing the materials?

A. Frankly, Mr. Abbott, we were more interested in the services these items we are referring to than their value.

Q. Did you get any other bids for the airplane in the months of December, 1950, or January, 1951? And by "the airplane," I mean the airplane in suit.

Mr. Nelson: Your Honor, if I may object. I believe that can be clarified. He has stated two months, December and January, and January would be within the notice period. If he wants to ask as to bids prior to the notice period, and bids in accordance to the period, it might be clear to the court; certainly to the witness.

Mr. Abbott: Well, I will make the question very broad, your Honor.

Q. (By Mr. Abbott): Have you received any other bids for the aircraft in suit, Mr. Bancroft?

A. I interpret your question, Mr. Abbott, by "bid," to mean that it is an agreement or something presented which is acceptable under terms of advertisement, and asked for by the Board. And to my knowledge none was received.

Q. Well, did any person, other than the Finns,

(Testimony of Peter A. Bancroft.)

make to you, in writing or orally, an offer to pay cash for the airplane in suit?

A. We have had a number of such offers.

Q. Did you have an offer in the month of March 1951, [427] for $28,602?

Mr. Nelson: I am going to object to that as being beyond the time of this agreement, and certainly irrelevant, incompetent and immaterial.

Mr. Abbott: It is material—has the court ruled?

The Court: What is the purpose of it?

Mr. Abbott: Two purposes, your Honor; one to show value of the aircraft, and the other to show the amounts available to the School District from other sources. Mr. Bancroft has testified at great length to the peculiar benefits to the School District on this particular transaction. We wish to show another transaction was even more beneficial to the School District.

The Court: How would it be determined? Assume the transaction was improvident. How would that affect the legality?

Mr. Abbott: That is a matter opened on direct examination, your Honor; not opened by the Government.

The Court: Opened because of the Government's charge that this defendant interfered with advantageous contractual relationship, which is a wilful tort, and the Government wishes to charge diversion, also, which is a wilful tort.

Mr. Abbott: Isn't the value of the airplane on this date so close to the date of execution of Vine-

(Testimony of Peter A. Bancroft.)

land's B material to a determination of the value of the aircraft; which certainly [428] these defendants say was scrap on that occasion?

Mr. Nelson: If your Honor please, on this matter of value, certainly a bid, on which no foundation has been laid here, as to where it came from, who, what time—it might have come out of some local farmer, as far as we know, that has no idea of what the value of the aircraft was—what bearing does that have to something which has been alleged here as to the actual value of the aircraft. That argument falls on its face.

Mr. Abbott: I will lay the foundation, if that is counsel's objection.

Mr. Nelson: That isn't the only objection. No bid which is offered after the agreement has been entered into, the aircraft sold, would be a reasonable basis for determination of that.

Mr. Blackman: International joins in that objection, your Honor. The airplane had been sold as of the time counsel is now speaking. We feel it has no bearing.

Mr. Abbott: The witness said there was no intention of disposing of the aircraft on February 28, 1951, your Honor.

The Court: There was no intention?

Mr. Abbott: No intention to make a present transfer on that date.

The Court: But obligation wasn't there. The School District was not in a position to bargain with

(Testimony of Peter A. Bancroft.)

anyone else [429] after they made a contract with the Finns.

Mr. Abbott: The School District also takes the position it made no disposal. Further, this particular offer I refer to is dated approximately nine days after Vineland's Exhibit B, and therefore could hardly be more timely as an indication of the value of the aircraft on that date. Proper foundation as to the offeror and his address and his occupation can be made.

The Court: Mere offers are not evidence of value. Objection sustained.

Mr. Abbott: Will the clerk please place before the witness Vineland's Exhibit E?

The Court: If you wish to make a record of excluded evidence pursuant to Rule 43(c) you may do so.

Mr. Abbott: I had intended to make an offer of proof during recess. If the court will accept it now, I will make it at this time. May the offer be made at this time in the presence of the jury?

The Court: I would suggest you make it at the recess.

Q. (By Mr. Abbott): Are you now viewing Vineland's Exhibit E?

The Court: I will reverse that. You may make it now in the ordinary presentation. The jury will be instructed to disregard it.

Mr. Abbott: Thank you, your Honor. [430]

The Government offers to prove by the witness on

(Testimony of Peter A. Bancroft.)

the stand that on or about March 8, 1951, Vineland Elementary——

The Court: If you are going to make an offer of proof, and not a record of excluded evidence, make the offer of proof at the recess. I understood you wished to make a record of excluded evidence pursuant to Rule 43(c).

Mr. Abbott: It is an offer of proof.

The Court: You may make it at the recess.

Q. (By Mr. Abbott): Are you now viewing Vineland's Exhibit E, Mr. Brancroft?

A. Yes.

Q. Did you receive that document from Mr. Heddleston at the same time that you received Plaintiff's Exhibit 1, the Form 65 agreement form?

Mr. Nelson: Objection, your Honor, as assuming a fact not in evidence. It has not yet been established that this Form 65 was received from Mr. Heddleston.

The Court: Sustained.

Q. (By Mr. Abbott): Did you receive Vineland's Exhibit E from Mr. Heddleston?

A. I believe so.

Q. And did you receive it with any other documents?

A. We received a large number of documents in this transaction with Mr. Heddleston over a long period of time. We spent considerable time even trying to get information— [431] and it is no criticism of his office; very prompt and all that—but we received a large number of documents pertaining to

(Testimony of Peter A. Bancroft.)

aircraft disposal, and on and on, and I assume that this was one of them.

Q. In fact, your correspondence relative to the acquisition of surplus property was with Mr. Heddleston, was it not?

A. That is correct. And it was very extensive.

Q. And addressed to him at Washington, District of Columbia? A. Yes, sir.

Q. Will you explain to the jury, and to the court, Mr. Bancroft, how it is, if you intended at the time of execution of Vineland's Exhibit B to pass no present title to the aircraft, that on the same occasion you executed the bill of sale, International's A—which I will ask be placed before you.

Mr. Nelson: Objection, your Honor, on the ground that we are assuming facts not in evidence; particularly, that the bill of sale was executed at the same time that the agreement was.

Mr. Abbott: It bears the same date, your Honor; each dated February 28, 1951.

The Court: The objection is sustained.

Q. (By Mr. Abbott): Mr. Bancroft, did you execute [432] International's Exhibit A, the bill of sale, to the Finns at the same time that you executed Vineland's Exhibit B, the agreement dated February 28, 1951? A. It is dated April 14th.

Q. Are you referring to International's Exhibit A, bill of sale? A. Yes, sir.

Q. Did the intention of yourself and the School District change during the period btween February 28th, 1951, and April 14, 1951, as that intention re-

(Testimony of Peter A. Bancroft.)

lated to the transfer of full title and possession to the aircraft in suit?

A. Mr. Abbott, if you will refer to the contract, or the agreement, rather, Vineland's Exhibit B. I think it is very definite, in this it states title does pass according to this agreement. Now, this word "title" has constantly cropped up here, and I am not a lawyer, as I stated, and I don't understand its connotation. Regardless of whether we signed this title, or when the date of signing was, it still states in this agreement that regardless, that this District will not pass official title.

Mr. Abbott: Will you read the pending question, Mr. Reporter?

(The question was read.)

Q. (By Mr. Abbott): Will you answer that question?

Mr. Nelson: We object to the question as being compound, [433] asking for both the District's intention and the superintendent's intention, and it would appear to be confusing to me, let alone the witness. Perhaps it can be restated.

Mr. Abbott: I would be very happy to restate it.

Q. (By Mr. Abbott): Did your personal intention with respect to the retention of title and possession change during the period from February 28, 1951, to April 14, 1951? A. No, sir.

Q. Did the intention of the District on that subject change during that period?

(Testimony of Peter A. Bancroft.)

A. I can't speak for the District. You mean the trustees?

The Court: Yes. As far as known to you.

The Witness: As far as I know—I don't know the intention of the District, of the trustees. To my knowledge it never had.

Q. (By Mr. Abbott): Will you explain what it was that caused you to execute International's Exhibit A, the bill of sale, on April 14, 1951, prior to the time that the defendants Finn had completed conformance of the several things they undertook to do in Vineland's Exhibit B?

A. Mr. Abbott, the way these things are being presented, they appear very mysterious. As I tried to outline before, our District is small. We don't have——

The Court: How did you happen to sign the bill of sale? [434] Did one of the defendants Finn come up and say, "Please sign it?" or how did you happen to sign it?

The Witness: That is probably the gist of it.

The Court: Don't you remember?

The Witness: We just didn't take the time to sign the bill at the time of agreement and acceptance by the Board.

The Court: Who asked you to sign the bill?

The Witness: The Finns.

The Court: Do you remember?

The Witness: Yes, your Honor.

The Court: Which one? Both of them or one of them.

(Testimony of Peter A. Bancroft.)

The Witness: I don't remember which one, your Honor.

The Court: Do you remember what they said to you, at the time, about the subject?

The Witness: I think there was a discussion to the effect that—that the agreement called for the signing of a bill of sale; that it had not been done, and therefore it was in order.

The Court: The next question.

Q. (By Mr. Abbott): In connection with the sale of the hulk, Air Force No. 42-96563, did the Vineland Elementary District pass a resolution?

A. No, sir.

Q. Did it file and publish notice for bids?

A. No, sir. [435]

Q. Did it receive bids from any persons other than the Finns? A. No, sir.

Q. Did it require the Finns to secure clearances from the United States?

A. This was just a piece of junk, sir.

The Court: Was there any requirement?

The Witness: No, sir, your Honor.

Q. (By Mr. Abbott): Did the Finns tell you that they intended to fly that airplane? Referring to the hulk, Air Force No. 42-96563.

A. Yes, sir, they did.

Q. Did they tell you about the time that you, acting for the District, sold it to them?

A. They told us that a number of times. We could hardly believe it, that it could be true. It was in very, very poor condition.

(Testimony of Peter A. Bancroft.)

Q. Was the sale of the hulk ever discussed in a meeting of the Board of Trustees?

A. Not a regular meeting.

Q. Was it discussed at any other meeting?

A. Yes, it was.

Q. Was that a special meeting, as that term is used in the statutes?

A. In an informal meeting. [436]

Q. Was there any request by the Finns for a bill of sale on that aircraft prior to February 28, 1951? And by "that aircraft," I mean the hulk.

A. As I recall—of course, I don't understand this business of bill of sale, again. I believe we gave them some evidence in writing of transfer. You see, this wasn't an airplane, as we thought of it as a piece of junk, piece of metal, and didn't think of it at all in the same conditions as the plane in suit.

Q. Well, do you mean that you gave them some writing of transfer other than a Civil Aeronautics Administration bill of sale?

A. We didn't give them any formal bill of sale, that I recall, at all. I think we merely—and I am not positive on this matter—I think we gave them a letter in writing saying, "this piece of junk is yours," or something like that. I don't recall the wording.

Q. And you did that before February 28, 1951?

A. The transfer to the Finns was before that date. And if such written evidence was made, it would be prior to that date.

Q. Then, Mr. Bancroft, why was it necessary to

(Testimony of Peter A. Bancroft.)
execute a second document of title, this time on the Civil Aeronautics Administration form, after February 28, 1951?

A. That I don't understand, Mr. Abbott, because it [437] was a piece of junk. We transfered title—it had very little value, and we wanted to get rid of it. It was an eyesore on the property, and we assumed, I guess, there was some reason for it.

Q. Did Mr. Finn come to you, either Mr. Finn, come to you after February 28, 1951, and tell you that he wanted a Civil Aeronautics Administration bill of sale on the hulk so that he could secure registration in his name of that aircraft at Washington?

A. I don't recall any reference to the bill of sale with reference to the Civil Aeronautics Administration. To me, it was just another visual evidence of passing title, and I don't recall any reference to his methods or purpose for such a bill of sale.

Q. Did Mr. Finn explain to you at that time, at the time you signed the bill of sale on the hulk, which is Government's Exhibit No. 12, why the second bill of sale, or document transferring title, was necessary after an agreement had been signed requiring return of that aircraft to the School District?

A. I don't remember any direct discussion, other than what had been done was not complete enough as a bill of sale, and that is why the other one was signed.

Q. Did Mr. Finn show to you, at the time, or about the time that you delivered possession of the

(Testimony of Peter A. Bancroft.)

aircraft in suit to him, a ferry permit or Civil Aeronautics Administration [438] registration certificate? A. One or the other, yes, sir.

Q. Well, which was it?

A. Well, that I can't say.

Q. Did you have a discussion with him at that time as to what other documents evidencing Government consent to the transaction with the School District, or Government release of restrictions he might have?

A. Yes, sir. I asked at the time what evidence this permit that the restrictions have been removed, and it was his statement that could not be issued unless the restrictions had been removed.

The Court: By "this" you——

The Witness: From the Government.

The Court: What could be——

The Witness: Clearances, that this permit could not be issued unless the restriction had been removed.

The Court: Is that permit here, this document to which you refer, this writing to which you refer? Is it here in evidence?

The Witness: That I don't know.

The Court: You haven't seen it?

The Witness: No, I haven't.

Mr. Blackman: Your Honor, if I may assist the court, I note in the list of exhibits, Defendants Finn Exhibits, [439] documents which may answer that description. I refer to Defendants Finn Exhibit C-1——

(Testimony of Peter A. Bancroft.)

The Court: Please place that document before the witness, Mr. Clerk.

Mr. Blackman: ——C-2 and C-3. I don't know which of them it might have been, but those are all ferry permits.

Mr. Abbott: Well, it could logically be one.

Will you place C-1 before the witness, please, Mr. Clerk?

Q. (By Mr. Abbott): You are now viewing Defendants Finn Exhibit C-1, Mr. Bancroft, entitled "Application and authorization for ferry permit," dated October 10, 1951. Is that the document that was displayed to you by the Finns?

A. I can't say definitely that it was not; but it doesn't look like the one I saw. [440]

The Court: It does not appear to be?

The Witness: It does not appear to be, yes, your Honor, but I can't say positively. This is a ferry permit, and I believe it was some sort—well, I am not certain, but this doesn't look like it.

Q. (By Mr. Abbott): Did you have any discussion with the Finns at that time as to what other papers they might have evidencing governmental consent to the transaction with Vineland?

A. No, sir. We maintained, as we do in many of our school activities, a feeling of trust with those with which we work, and the Finns had always lived up to that evidence, and when they assured me by showing me this permit that they had received the necessary releases from the Government,

(Testimony of Peter A. Bancroft.)

I assumed that that was true. We had never at this time seen any evidence that the Finn boys were not living up to their contract.

Q. Did they have any other discussions with you at that time?

A. I don't recall any other, but we had a lot of discussions, so I wouldn't say no.

Q. Were you ever told by either of the Finns that they had other papers beyond the ferry permit, but that they did not desire to show these because they felt that if the method that they had used to obtain them was known, that other [441] people interested in buying planes could follow the same procedure?

The Court: That assumes a fact not in evidence. You say "the ferry permit," and he has not stated that he saw that.

Mr. Abbott: Your Honor, I am laying a foundation for a statement of the witness.

Mr. Nelson: Your Honor please, I am going to object to the question on the ground there has been no foundation laid for the particular question that he is presenting.

The Court: Sustained.

Mr. Abbott: If the court please, I desire to show an inconsistent statement by the witness.

The Court: You may proceed in a proper way.

(Thereupon a document was handed to counsel for the defendants.)

The Court: All right, gentlemen, let's proceed

(Testimony of Peter A. Bancroft.)

now, and let's move on. I don't want to give you time to hold a conference over it.

Mr. Nelson: This is a 4-page document.

The Court: All you are entitled to do is to examine the documents so that you will know what we are speaking about. You may examine it later, and you may examine the witness with respect to it, but let's not delay the examination at this time.

Mr. Nelson: Yes, you may continue. [442]

Mr. Abbott: I have, and will point out to counsel the particular section of not more than 50 or 60 words which I am interested in.

The Court: I had assumed you had pointed out to them what you have in mind.

Mr. Abbott: I have, your Honor.

The Court: Very well. Let's proceed.

Mr. Abbott: I will ask the clerk to mark a 4-page document, handwritten, the 4 pages not connected, dated Bakersfield, California, June 4, 1952, purportedly signed——

The Court: Don't go into all that detail. You have identified the document. Now, let him mark it for identification, and then we can refer to it hereafter by its identifying number.

Exhibit 13, Mr. Clerk?

The Clerk: Yes, your Honor, Plaintiff's 13, for identification.

(The document referred to was marked Plaintiff's Exhibit No. 13 for identification.)

(Testimony of Peter A. Bancroft.)

The Court: Do you wish it placed before the witness?

Mr. Abbott: May it be placed before the witness?

(The document was placed before the witness.)

The Court: What portion do you wish to direct the witness' attention to?

Mr. Abbott: Starting at the bottom of the second page [443] of that document, Mr. Bancroft, and going on through the third page, do you find the following language——

The Court: Just a moment, now. The document speaks for itself, whether he finds it or not. Do you want him to read it to himself? Do you wish him to read it to himself?

Mr. Abbott: Well, I wish him to identify first the portion which I would ask him to read.

The Court: Very well. Ask him to read to himself a certain portion of it, and when he has done it, to let you know.

Mr. Abbott: Will you read the material beginning at the bottom of page 2.

May I assist the witness to show him the particular point, your Honor?

The Court: Yes.

(Whereupon counsel indicated the portion of the document.)

The Witness: I find no fault with that statement.

(Testimony of Peter A. Bancroft.)

The Court: Have you read it all that he wants to know about?

The Witness: Yes, sir.

Q. (By Mr. Abbott): Is the entire statement of four pages written by you, in your own handwriting? A. No, sir, it is not.

Q. Is it a document which you read and signed on the date which it bears? [444]

A. Yes, sir.

Q. Has there been any change or alteration on its face since the execution by you?

A. I see no evidence of any.

The Court: Next question.

Mr. Abbott: We offer the document, Plaintiff's Exhibit 13 in evidence.

The Court: Any objection?

Mr. Nelson: No objection.

The Court: Received in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 13 for identification, was received in evidence.)

Mr. Abbott: I request permission to read a portion thereof to the jury, commencing at the bottom of page 2, and continuing on to the top of page 3.

The Court: You may.

Mr. Abbott: (Reading.)

"I do not recall whether I was presented with the papers which was to have cleared the plane for sale to them. As I recall one of the Finns, whom I believe was Charles Finn, showed me a permit

(Testimony of Peter A. Bancroft.)

from the Civil Aeronautics Administration, which would allow the plane to be flown to Burbank, California. I was told that the permit would not have been granted unless the CAA was satisfied that all [445] legal restrictions had been removed. I was also told by one of the Finns that they had other papers beyond the ferry permit but they they did not desire to show these because they felt that if the method that they had used to obtain them was known, that other people interested in buying planes could follow the same procedure. From a business standpoint they felt they had done the ground work and should have the benefit rather than share it with someone else. It was our understanding that the plane was not to leave Burbank until all the terms of our agreement had been met." That concludes the Government's examination, your Honor.

The Court: Any further questions of Mr. Bancroft?

Mr. Nelson: Yes, your Honor.

Redirect Examination

By Mr. Nelson:

Q. Calling your attention, Mr. Bancroft, to this other C-46 which we have referred to herein as the hulk, what was the condition of this aircraft at the time that it was sold to the Finns?

A. It had no gear. It was on blocks on the ground.

(Testimony of Peter A. Bancroft.)

Q. By "gear," will you clear that up?

A. Wheels and struts; had no ailerons, or other control [446] surfaces. The cockpit and cabin had been completely dismantled. The plane had been dropped upon its belly, if you will excuse the term, and crushed, and I think it is evident that the belly is a part of the structure of the plane, and if that is damaged, it is serious.

In fact, we had people come in and look at it, and just shake their heads, and say, "No, it has no value. It will take a fortune to fix it."

The control cables had been severed. It was really in poor condition, and as far as we ever thinking that it could be flown, it was out of the question.

Q. Did the district have any thought or idea of using that aircraft in that condition for educational purposes at that time?

A. Not in that condition, no, sir.

Q. At the time this aircraft was sold to the Finns, which you indicated was a few months prior to the agreement in question with the Finns, did the district at that time have any idea that it was going to sell the subject aircraft that was being used for a classroom? A. No, sir.

Q. Was there any discussion with the Finns at the time this hulk was sold to the Finns of the possibility of selling the other aircraft to the Finns?

A. No, sir. [447]

Q. When you used the word "junk" in connection with this plane, this hulk, do you associate that word with the word "scrap"?

A. This word "scrap," as I understand it,

(Testimony of Peter A. Bancroft.)

doesn't mean what the reference in the Civil Code refers to. To me "scrap" means something that is surplus or has no value to the owner, but still could be in a very good condition for other purposes. "Basic material content" is an entirely different situation.

Q. Mr. Bancroft, I am not going to ask you at this time to go into trying to determine these various technical terms. Prior to this hearing, before we did get into such a discussion, what would have been your association of the word "junk" and the word "scrap," as a superintendent of schools?

A. Well, I assume they could have something in common, especially as far as we are concerned, with the plane, that we wouldn't want it any more.

The Court: And "scrap" would be high-grade junk; is that it?

The Witness: Yes, your Honor.

Mr. Nelson: No further questions. [448]

Recross-Examination

By Mr. Abbott:

Q. Did you ever assume that the hulk had been reduced to its basic material content?

A. Mr. Abbott, we just have gone through this matter of terms, and I am not an authority on terms. It had no value to us.

The Court: Let's not spend any more time on that.

Mr. Abbott: One more question, your Honor.

(Testimony of Peter A. Bancroft.)

Q. Was the statement which I have read from Plaintiff's Exhibit 13 correct as a matter of fact, as you now recall, Mr. Bancroft?

A. I found one word which I am not positive is correct, Mr. Abbott. In essence, it is correct. [449]

Q. What is that word?

A. The statement here, and which I have signed says that the Finns—maybe I can refer back to it. "I was told that the permit would not have been granted unless the CAA was satisfied that all legal restrictions had been removed. I was also told by one of the Finns that they had other papers beyond the ferry permit."

Now, that word "papers" is specific, and I wouldn't verify that the word "papers" was in the conversation. They had other information or evidence that these restrictions had been removed, but I wouldn't care to state there were other papers. I haven't seen them, and I don't think they referred to papers by that title.

Q. But, in any event, the rest of the material which has been read to you is correct, according to your present recollection as it is now refreshed?

A. Yes, sir.

Q. And, in particular, there is the statement, "they did not desire to show these because they felt that if the method that they had used to obtain them was known, that other people interested in buying planes could follow the same procedure."

Was that correct, according to your present recollection as refreshed?

(Testimony of Peter A. Bancroft.)

A. Yes, sir. They told us that they had spent considerable [450] time in Washington running this information down, that they had the information that was necessary, and that they were not interested in disposing of that information at the time, because other people also in the business, as Mr.—our expert, Mr. Duly, has testified—would get that information and obtain planes which they may know about, in addition to the plane in suit, and it was their desire to follow through, and they told us at the time they were interested in other aircraft, because they wanted to establish an airline of their own.

Q. Are you now telling me something more about the same conversation?

A. Merely in justification of the statement and about the conversation.

Q. That is something else that you recall about the conversation?

A. No, it is only that it has been signed here.

The Court: Who wrote this document, Exhibit 13?

The Witness: I believe Mr. Buxton of the Federal Bureau of Investigation.

The Court: In other words, Mr. Buxton came to you for the statement of the facts in this matter, and he himself wrote up Exhibit 13, after talking with you, and asked you to sign it?

The Witness: Yes, your Honor. And we went over it [451] again to see if there were any errors, and he made the statement that I was under no

(Testimony of Peter A. Bancroft.)

compulsion to sign, and I realized that. I did that voluntarily.

The Court: Any further questions of Mr. Bancroft?

Mr. Abbott: No further questions.

Mr. Nelson: No further questions.

The Court: You may step down, Mr. Bancroft.

(Witness excused.)

The Court: We will take the noon recess until 1:45, members of the jury, and again, before we separate, I must admonish you of your duty not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of this trial, and not to form or to express an opinion on this case until after it has been finally submitted to you for your verdict.

You are now excused until 1:45 this afternoon.

(Thereupon the jury retired from the courtroom.)

The Court: Is it stipulated, gentlemen, that the jury have left the courtroom?

Mr. Abbott: So stipulated.

Mr. Nelson: So stipulated.

Mr. Blackman: So stipulated.

The Court: The record will so show.

Do you wish to make an offer of proof?

Mr. Abbott: I do, your Honor. [452]

The Government offers to prove by the witness, Peter A. Bancroft, that on or about March 9, 1951,

Mr. Bancroft received a bid in writing for the purchase of the aircraft in suit in the sum of $28,000.

The Court: Cash?

Mr. Abbott: Cash. If the court will indulge me a moment, I am searching for the name of the offeror. That is from Guy Hardsell of San Fernando, California.

The Court: Any objection to the offer?

Mr. Blackman: We will object to the offer, your Honor, on the ground that at the time mentioned the airplane had been sold, and that any offer of this type would, therefore, be incompetent, irrelevant and immaterial; and, further, that there is no proper foundation shown as to any knowledge that Guy Harsdsell may have had as an expert witness regarding the value of the airplane. He is not here subject to cross-examination as to what he wanted to use it for, whether as an antique to put in his backyard, or to put in a flyable piece of machinery.

Mr. Nelson: If the court please, may we also join in the objection as stated by Mr. Blackman, and also point out to the court that this certainly cannot be an opinion of value, it cannot be any basis for value, and I have just been told that this gentleman, Mr. Guy Hardsell, is now dead, and cannot be examined in this matter in order to determine the foundation or the basis for which it was given. [453]

Mr. Abbott: I did not propose to lay the foundation by Mr. Hardsell, but by Mr. Bancroft, your Honor, and we will further purport to show by the

witness Bancroft that Mr. Hardsell was in the business of buying and selling surplus aircraft.

The Court: The same objection?

Mr. Blackman: The same objection.

Mr. Nelson: The same objection, plus the objection of hearsay, your Honor.

The Court: Sustained. Does that complete the offer?

Mr. Abbott: It does, your Honor.

The Court: The trial will be recessed until 1:45 this afternoon. Court will recess until 1:30.

(Whereupon, at 12:03 o'clock p.m. a recess was taken until 1:45 o'clock p.m. of the same day.) [454]

Friday, October 29, 1954; 2:15 P.M.

The Court: The case on trial, is it stipulated, gentlemen, the jury are present?

Mr. Blackman: So stipulate.

Mr. Nelson: So stipulate.

Mr. Abbott: So stipulated.

The Court: The record will so show. You may call the next witness.

Mr. Nelson: If the court please, during the noon recess the defendants Finn have handed me a letter, which is part of their files, entitled "Bill of Sale," concerning the hull aircraft, dated October 9, 1950. And for the court's review, we would like at this time to call Mr. Bancroft and submit this letter into evidence.

The Court: You may recall him.

Mr. Nelson: Mr. Bancroft, will you take the stand?

Mr. George C. Finn: Your Honor, may I state that any such participation on our part is to make sure no harm comes to any defendant on behalf of the Government in our refusal to go along with this.

The Court: You may proceed. [455]

PETER A. BANCROFT

called as a witness on behalf of the Vineland School District, having been previously sworn, resumed the stand and testified further as follows:

Mr. Nelson: May we have, at this time, this letter marked for identification as Vineland's Exhibit F?

The Court: It may be so marked.

Exhibit F was a film.

Mr. Nelson: Pardon me. This is G.

The Court: Is that correct, Mr. Clerk?

The Clerk: Yes, your Honor.

(The document referred to was marked Defendant Vineland's Exhibit G for identification.)

Mr. Nelson: Will the clerk please hand it to the witness? [456]

Q. (By Mr. Nelson): Mr. Bancroft, do you recognize the letter that has been placed before you, Exhibit G? A. Yes, sir.

Q. Does it contain your signature?

A. It does, sir.

Q. Do you recall having given this letter to the

(Testimony of Peter A. Bancroft.)

defendants Finn approximately the date that appears thereon? A. Yes, sir, I do.

Mr. Nelson: We ask the court to receive this in evidence at this time.

The Court: Is there objection?

Mr. Abbott: No objection, your Honor.

The Court: Received in evidence.

(The document referred to, marked Defendant Vineland's Exhibit G for identification, was received in evidence.)

Mr. Nelson: That is all I have, your Honor.

The Court: Any further questions of Mr. Bancroft?

Mr. Abbott: It will be very brief, your Honor.

Cross-Examination

Mr. Abbott: Mr. Clerk, will you place before the witness International's Exhibit T.

(The document was placed before the witness.)

Q. (By Mr. Abbott): Will you inspect the document placed before you, International's T, Mr. Bancroft? [457]

(The witness did as requested.)

Q. Have you completed your inspection?

A. Yes, sir.

Q. Can you state whether or not the aircraft

(Testimony of Peter A. Bancroft.)

described in that document is the aircraft referred to in this action as the hulk?

A. Would you restate that question?

Q. The document you are viewing describes an aircraft, does it not? A. Yes, sir.

Q. Is that the aircraft which we have referred to in this action as a hulk?

A. I believe it is, sir, because it is dated 1948, and we had the plane in suit in 1946.

Q. You have only purchased a total of two 46A aircraft, have you? A. Yes, sir.

Q. So that this necessarily must be one of the documents issued with respect to the hulk; is that correct? A. Yes, sir.

Mr. Abbott: No further questions, your Honor.

The Court: Any further questions of Mr. Bancroft?

Mr. Nelson: If the court please, the other day we noted that the Exhibit A, which was the specifications, was not attached to the agreement, and we desire at this time—— [458]

The Court: The agreement is?

Mr. Nelson: Exhibit B, Vineland's.

The Court: Vineland's Exhibit B.

Mr. Nelson: And if we may, your Honor, I would like to present that at this time, and attach it to Vineland's Exhibit B, so that that exhibit will be complete.

The Court: I suggest you complete it, and in view of the amount of participation by the defendants Finn, I suggest you lay a foundation by the

(Testimony of Peter A. Bancroft.)

witness, that this is a true copy, and it is necessary to complete Vineland's Exhibit B.

Mr. Nelson: Very well, your Honor.

Mr. Charles Finn: Your Honor, so as not to jeopardize the other defendants, we will participate in it.

The Court: Will you stipulate the document here is a true copy of what it purports to be, and that it may properly be attached to Vineland's Exhibit B, the agreement of February 28, 1951?

Mr. Charles C. Finn: Yes, your Honor.

Mr. George C. Finn: Yes, your Honor.

The Court: Do all the other parties so stipulate?

Mr. Abbott: So stipulated.

Mr. Blackman: So stipulated.

Mr. Nelson: So stipulated.

The Court: Very well. It may be attached. It will be attached and become a part of Defendant Vineland's School [459] District Exhibit B in evidence.

Mr. Nelson: I have no questions now of Mr. Bancroft.

The Court: You may step down.

Mr. Abbott: I have one question with respect to the document last marked, your Honor.

The Court: Very well.

Mr. Abbott: I will take a moment, because I haven't seen this document previously.

Mr. Clerk, will you please place Vineland's Exhibit B before the witness?

(Testimony of Peter A. Bancroft.)

(The document was placed before the witness.)

Q. (By Mr. Abbott): Mr. Bancroft, you are now viewing Vineland's B, now completed by the attachment of certain pages of specifications. You will note that certain of the items on the pages of specifications are marked with the letters, "Ok." Do you know how those letters were attached, and how they came to be placed on the document?

The Court: The letters "Ok"?

Mr. Abbott: Yes, your Honor.

The Witness: I would assume, Mr. Abbott—I think those are in my writing—that the copy which has been photostated here was probably a work copy that we had in our district, and that the okays must either refer to the submission of this material to the district as part of the completion, or the fact that these items being listed here would be correct [460] as to our thinking, as compared to some other possible list which we may have had.

Q. (By Mr. Abbott): Does that notation indicate that the work included within a particular item marked "OK" had been completed?

A. I would be inclined to say no, because if you will refer to page 2—do you have the same?

Mr. Abbott: I do not have a copy of the document, but with the court's permission, I will look at it at the witness stand.

The Court: You may.

The Witness: No, I am in error.

(Testimony of Peter A. Bancroft.)

Q. (By Mr. Abbott): Speak up.

A. I am in error, because there is one item under No. 9, page 2, under II, that states, "Paint exterior of plane," and I was going to refer to that as an item which had been done, and that happened to be with reference to the other plane, as I recall. I have to go back on that just a minute.

Yes, I believe that this does refer to the hulk airplane, and the fact that I believed at the time that this list of specifications—I would have to answer you probably no, because there is work that was done first on the plane, which is not referred to here, such as pertaining to the painting of the exterior of the plane. That was one of the first things done. [461]

Q. To the extent that Vineland's B does describe work to be done by the Finns, do the markings "OK" indicate that portion of the work which has been completed?

A. In answering your question, I would again repeat that it probably did not mean that, because one of the first things done was painting the exterior of the plane, and that is not marked "OK."

Q. Then do you know what the notation "OK" means at the various points where it appears on Vineland's B?

A. No. As I stated, it could have been referred to another list, as this was drawn up, or as we referred to it, apparently, of things that were in order, because of work that had been done prior

(Testimony of Peter A. Bancroft.)

to the items being delivered to the district, or being marked "OK."

Mr. Abbott: No further questions, your Honor.

Mr. Nelson: No further questions.

The Court: You may step down, Mr. Bancroft.

(Witness excused.)

The Court: The next witness for Vineland School District. [462]

Mr. Nelson: I wish to call at this time Mr. Walter Johnson.

WALTER L. JOHNSON

called as a witness by defendant Vineland Elementary School District, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Walter L. Johnson.

Direct Examination

By Mr. Nelson:

Q. Mr. Johnson, where do you presently reside?

A. In Bakers—well, in Weed Patch, you might say.

Q. Is it a rural address? A. Yes.

Q. What is your present occupation?

A. Farmer.

Q. Do you have any other occupations besides farming, such as an interest in another business?

A. No.

Q. Are you presently a member of the Vineland

(Testimony of Walter L. Johnson.)

School District Board? A. Yes.

Q. Were you a member of the Vineland School District [463] Board at the time the transaction occurred on the subject aircraft?

A. You mean in '46 or '51 or——

Q. Yes. Well, '46 and '51.

A. Yes.

Q. Both times? A. Yes.

Q. How long have you been a member of the Vineland District School Board?

A. I think this is my twelfth year.

Q. Are you duly elected by the people in the area? A. Yes.

Q. Are you presently the chairman of the Board of Trustees of that District?

A. Yes; this particular time.

Q. You heard the testimony this morning concerning—and all through this trial—concerning the various offers that have been presented to the District at different times, both by the Finns and other persons. Would you state to the court the reason for the District not accepting these other offers?

Mr. Blackman: Just a moment.

Mr. Abbott: Your Honor——

Mr. Blackman: I take it that counsel is limiting his question up to February 28, 1951. If that is his limitation, [464] I have no objection to the question.

Mr. Nelson: I will so limit it.

Mr. Abbott: We do have an objection, even so

(Testimony of Walter L. Johnson.)

limited. The court has ruled that Mr. Bancroft's subjective intention may be material. However, the intention of the Board of Trustees, the Government's view, is not material. It is the official acts which have a bearing on this proceeding.

Mr. Nelson: If the court please, the matter of intention of the Board of Trustees, which explain an ambiguity which appears in the agreement, is extremely in point.

The Court: What is the ambiguity?

Mr. Nelson: As read to the court this morning, on page 1 of the agreement between the District and the Finns, there appears a statement that the document shall pass title and possession to the aircraft upon execution. And then on page 4 appears the clause notwithstanding anything else in the agreement consents shall be obtained.

And I believe it is the position of the Government that the agreement in itself passes title, and we assert that there appears to be some ambiguity here in that respect. And, therefore, the intention of the Board, and the intention of the parties dealing with the Finns in connection with this agreement, as to when title was to pass, if at all, and whether it was conditional, is extremely important to this action. [465]

Mr. Abbott: If the court please, may the Government be heard? The agreement viewed as a whole conditions subsequent to the title on February 28, 1951.

(Testimony of Walter L. Johnson.)

The Court: Is the Government contending title passed subject to circumstances subsequent——

Mr. Abbott: But for the interest of the United States.

The Court: Yes.

Mr. Abbott: Yes.

The Court: Does the Vineland School District dispute that?

Mr. Nelson: Yes, they do, your Honor. To them it is a condition precedent that these matters be done; the matters shall be performed.

The Court: Subjective intention wouldn't control, would it? It would be the objective manifestation intention that would control. You may show all the circumstances surrounding the agreement. As I presently view the matter it would not be material in the slightest what these trustees thought about it a week before they entered into the transaction; might have changed their mind. The matter was in their discretion, I assume.

Sometimes the mere offer may prompt a seller to think of selling where he never thought of selling before.

Mr. Nelson: Well, that is correct, your Honor. I don't quite see the argument that is being presented. It still [466] appears to be important from the standpoint of the District, whether or not it is a condition precedent or subsequent.

The Court: It may well be. But what would the reasons for the District not selling have to do with it? They might have turned down a dozen offers

(Testimony of Walter L. Johnson.)

the week before that were better than this one; might have passed them by. But the fact that they were getting those offers alone might have prompted them to think, "well, let's sell this."

I don't perceive there is any pertinent inquiry for the court to attempt to open the minds of these trustees to see what they think about when they turned down the others.

Mr. Abbott: On the condition subsequent point, your Honor——

The Court: If the School District had title it is none of the Government's business. It sold or didn't sell when it did.

Mr. Nelson: It would be the Government's business to this extent: if they have not actually sold as yet because the conditions haven't been performed, there hasn't been a sale in violation of the agreement.

The Court: I don't think it is competent for the seller to get on the stand and say, "I didn't think I was doing that"; any more than he could get on when he signs the promissory note, he can't be heard to get on the stand and say, "I didn't really think I was obligating myself to pay. I [467] didn't intend that." What he objectively manifested, that is what we are to judge his intention by.

The objection will be sustained.

Mr. Nelson: Will the Vineland's Exhibit A be placed before the witness?

Q. (By Mr. Nelson): I call your attention, Mr. Johnson, to paragraph IV, Roman numeral IV, of

(Testimony of Walter L. Johnson.)

the agreement, and the following language contained therein:

> "It is expressly agreed and understood that this agreement is contingent upon the contractor's ability to secure the necessary clearances from the Government of the United States of America on restrictions now existing on the use and possession of the aforesaid aircraft——"

Strike that. I am reading the agreement instead of the note.

The Witness: That is what I thought. That doesn't correspond to anything I had.

Q. (By Mr. Nelson): To the following language in the notice, Mr. Johnson, in the middle of paragraph I:

> "Bidders are expressly notified that the aforesaid aircraft was acquired by the District from the Government of the United States and the War Assets Administration, subject to certain restrictions in the use thereof under the deed of conveyance. [468] The successful bidder will be required to secure the necessary releases to said restrictions from the proper governmental agency of the United States."

What was the District's purpose in placing this cause in the notice?

Mr. Abbott: The same objection. The notice

(Testimony of Walter L. Johnson.)

speaks for itself and what subjective purpose may have existed is immaterial.

The Court: It seems very obvious, doesn't it?

Mr. Nelson: It does to me, your Honor, yes.

The Court: Very well. The purpose is manifested by the language, and the language is not thought to be ambiguous, is it?

Mr. Nelson: There is some allegation there, I believe, your Honor, on the part of the Government that perhaps—not on the notice. It would be in the agreement.

The Court: Of course, whether a condition is a condition precedent or condition subsequent is a very troublesome problem whenever it arises. That is the reason I was asking Mr. Finn about that book on conditions subsequent yesterday. I thought we might need it before we finished the case.

Mr. Nelson: Yes, your Honor. And I thought it might be helpful to get the statements of the Board as to what they believed it did contain when they entered into the agreement.

The Court: I don't think it would be competent for [469] them to say.

Mr. Nelson: Very well.

Q. (By Mr. Nelson): Mr. Johnson, did the Board of Trustees ever give the defendants Finn a bill of sale on the subject aircraft? A. No.

Mr. Nelson: Answer orally. The reporter can't take a nod of the head.

Mr. Abbott: May we have a clarification as to

(Testimony of Walter L. Johnson.)

form, counsel? Authorized or delivered the bill of sale?

The Court: Does the District maintain Mr. Bancroft had no authority to give the bill of sale, which is Exhibit—part of International Airports' Exhibit A here?

Mr. Nelson: We do so maintain, your Honor. And we wish at this time to establish that although the Board of Trustees and Mr. Bancroft believed they had that authority and they acted properly, that their actions were not in accordance with the California Statute.

The Court: Now, the question now pending, you do not wish to ask, do you?

Mr. Nelson: Yes, I do.

The Court: It is admitted by all sides that the School District gave no bill of sale, is it not, as such? That is, there was no bill of sale executed by the District.

Mr. Abbott: The bill of sale, I believe, your Honor, [470] reads Vineland Elementary School District by Peter A. Bancroft, or words to that effect; purports to be the action of the District.

The Court: My recollection, from a cursory examination of it, it reads Peter Bancroft, superintendent. I suggest you examine it and see if there is any issue as to that.

In the meantime, do you expect to ask him whether the Board of Trustees authorized Mr. Bancroft to issue the bill of sale?

Mr. Nelson: I will not ask that direct question,

(Testimony of Walter L. Johnson.)

which may bring in the legality question. But I will show the actions of the Board were not proper, your Honor.

The Court: That is a question of law, isn't it? It wouldn't be competent for this witness to say, "We did it, but it wasn't legal."

Mr. Nelson: Exactly, your Honor. I am not going to ask him that question; merely facts which will show the fact that although it thought it was acting properly, it was not.

The Court: Isn't that a question of law?

Mr. Nelson: The ultimate question is, your Honor; but the factors leading up to it, I desire to make a record on it, your Honor.

The Court: Well, the pending question calls for a conclusion of law, and I will sustain an objection to it in [471] that form.

Mr. Nelson: All right.

Q. (By Mr. Nelson): Did the Board of Trustees, Mr. Johnson, ever discuss with Mr. Bancroft the issuing of this bill of sale which is being discussed?

A. Yes. I don't know as a board. I mean, what I would call a governing board within our school. There was several discussions.

Q. You did discuss it with him? A. Yes.

Q. Was that discussion carried on at a formal meeting of the Board?

A. Yes, it was formal.

Q. Was it in accordance with the regular meeting that you have every month at a specified time?

(Testimony of Walter L. Johnson.)

A. No, I don't think so.

Q. Did you receive any notice that a special meeting was going to be called for that purpose?

A. No, no. I am almost postive to that.

Q. Do you recall where this meeting occurred?

A. Well, not exactly; definite. It could have happened at the Vineland School or could have happened at the Sunset School. I remember talking about it. But to pin it down to specific place, I am not sure about that.

Q. Was it the type of meeting that the public is [472] invited?

Mr. Blackman: I will object to the form of that question; with respect to the type of meeting. I don't know——

Mr. Nelson: I will withdraw the question.

Q. (By Mr. Nelson): Was the public invited to this meeting? A. No, no.

Q. Calling your attention——

The Court: Is there any prohibition in the state law that forbids the Board of Trustees to get together and hold a meeting any time they wish?

Mr. Nelson: The only prohibition that appears in that connection was one passed by the '51 legislature of California which sets forth that a notice must be given to local newspapers and radio stations whenever there is going to be any type of a special meeting. There is still——

The Court: What about a television station?

Mr. Nelson: I imagine that would come into the

(Testimony of Walter L. Johnson.)

same category, your Honor. And only then when these agencies request that notification.

The only other requirement for being—for a special meeting, that notice was to be given to each Board member at the time that they appear.

The Court: Do you construe those to be mandatory provisions? [473]

Mr. Nelson: I do, your Honor.

The Court: Then if the Board of Trustees wanted to meet and couldn't get a notice to, say, Station WXYZ, the meeting would be invalid, or they couldn't hold it?

Mr. Nelson: Yes, your Honor. However, I will state——

The Court: Is there any precedent for that?

Mr. Nelson: It is a brand new law. I doubt if there are any cases.

The Court: It would take some very clear language to make me believe the legislature intended to invalidate a meeting because some radio station couldn't be notified.

Mr. Nelson: I believe the position of the court is well taken, and I would argue the same position. In this particular case we are not going to hold, or even attempt to try to prove to the court there was an invalidating of the meeting due to this '51 Legislature Act, but numerous cases which have been cited in our law brief, which point out that a meeting must be a public meeting and must be either a regular meeting or a meeting called by special notice in accordance with California statutes,

(Testimony of Walter L. Johnson.)

and that is our allegation here. It seems clear that the Board met. They discussed this matter. And I have no doubt that out in Vineland School District they felt it was a proper meeting of the Board, and they were acting in accordance with the law. But unfortunately Board members don't always know technical provisions of the [474] law. It is difficult enough for us to diagnose those matters out.

The Court: You mean the law of California.

How many members on the Board? Five?

Mr. Nelson: Three at the time; and now there are five.

The Court: Three. All three of them happen to meet in the hallway of the school and all three agree, "We are going to hold a meeting right here and now." The California law forbids them to do so?

Mr. Nelson: Exactly, your Honor.

The Court: I would have to be persuaded very strongly to find that.

Mr. Nelson: I call your Honor's attention to 2204 of the Education Code in connection therewith, and cases which we have pointed out in our brief which hold just that.

The Court: Invalidate a meeting unanimously called?

Mr. Nelson: Invalidate whatever the actions the Board took at that meeting; not a meeting, special meeting called for a purpose——

(Testimony of Walter L. Johnson.)

The Court: What about before the public? How much notice has to be given?

Mr. Nelson: 25 hours. Now, I will point out to the court an exception. If the Board meets and waives notice, it will be proper as long as those meetings are proper and aren't in the halls; not over the telephone. [475]

The Court: Well, the hallway would be public, wouldn't it?

Mr. Nelson: We hope so, your Honor.

The Court: I am not impressed by that sort of technicality.

Mr. Nelson: Frankly, I am not, either, your Honor. But I do believe it is the law.

The Court: Human beings don't act that way, and particularly, if they are a friendly meeting on fairly semi-formal basis, unless the law required it, I would not be inclined to so hold.

Mr. Nelson: I think the court's position is well taken. We have pointed out the law in our brief, however, and we ask that it be reviewed.

The Court: Very well.

Q. (By Mr. Nelson): When the ship was removed, Mr. Johnson, by the defendants Finn, was it the intention of the Board that the plane would be brought back, if necessary?

A. Yes. We were so informed, any time that we wished the plane to be back, if the agreement wasn't fulfilled, why, we—we were under the impression, when it flew off, it was going to be repaired.

Q. Would the Board have allowed the plane

(Testimony of Walter L. Johnson.)

to be removed by the Finns if they felt it would not be returned?

Mr. Abbott: I object. There again is the inquiry into [476] the subjective intent of the Board. There is a formal document which embodies the school's intent. The document is complete on the face and lawyer-drawn. It may be a question of waiver, and that would be a question of voluntary relinquishment of a known right.

The Court: Overruled. You may answer.

The Witness: Will you repeat that?

The Court: Please read it, Mr. Reporter.

(Question read.)

Mr. Nelson: I will rephrase it.

Q. (By Mr. Nelson): Would the Board of Trustees have alowed the Finns to remove the plane at the time they did if they had any knowledge that it would not be returned?

A. No, we would not.

Q. Who told the defendants Finn they could fly the plane off?

A. Mr. Bancroft, I believe.

Q. Did Mr. Bancroft meet with the Board of Trustees and discuss that matter before he allowed the Finns to fly it away?

A. Yes, we were so informed, yes.

Q. Was that at the formal meeting of the Board?

A. No, no. I think we were called around, maybe different ones, as to what the purpose was, and all.

Q. Did you tell Mr. Bancroft at that time it

(Testimony of Walter L. Johnson.)

was all [477] right with you as to letting the plane go? A. Yes.

Q. And what was the basis for which you allowed this plane to be flown off?

A. Well, the Finns had been working on this plane and they told us if they could take the plane down to Los Angeles and work on it that it would be safe. They had an awful lot of expense because they were hauling their parts back and forth up there, and we felt that they had always been fair with us, and everything, and we just figured it would be all right because they told us any time it would be flown back at our request. [478]

Q. Then was it the board's understanding that the Finns were to take the aircraft off only for the purpose of doing work on it down in Los Angeles? A. That is right.

Q. And that it would be returned to the district if any of the conditions had not been performed or consents obtained? A. Yes.

Q. And this meeting which you referred to, wherein you told Mr. Bancroft that it would be all right to let the Finns take the plane, occurred at the Vineland School or the Sunset School?

A. Well, now, I am not sure. It could been at the Vineland, or could have been at the Sunset, or it possibly could have been at one of the service stations or stores there. Definitely, I couldn't say any particular place where this meeting took place.

Q. Was it a meeting wherein the public was invited?

(Testimony of Walter L. Johnson.)

A. No, it was not a meeting of that sort. It was just a quick get-together.

The Court: Was the public excluded?

The Witness: The public wasn't. I don't know whether the public was even informed, or anything. We just met right quick.

The Court: If any of the public happened along that day, [479] could they have stayed there?

The Witness: I guess they could have heard the discussion, I guess. Yes, they could have done that.

Q. (By Mr. Nelson): Did the meeting occur at your regular meeting date?

A. No. If that occurred, it would have been a regular formal meeting, advertised meeting.

Q. Did you receive a notice of such a meeting?

A. No.

Q. Calling your attention to the other C-46 aircraft which has been discussed here today, commonly called here in the courtroom the hulk, what was the condition of this hulk at the time that it was resting on the school district grounds, and prior to being sold to the defendants Finn?

A. Well, I don't know what you mean by condition, but so far as the looks of an airplane, why, it was nothing.

Q. Were there any parts removed therefrom?

A. On the hulk?

Q. Yes. A. There was no parts on it.

Q. Were there any engines on it? A. No.

Q. It was merely a shell of an aircraft, such as the fuselage, and the wings, and the tail?

(Testimony of Walter L. Johnson.)

A. Yes. [480]

Q. Did you have any idea at the time the aircraft—and when I say "you," I refer to the board of trustees—at the time of the sale of the hulk to the Finns that you were going to sell the subject aircraft?

A. You mean, the time we sold the hulk, did we intend to sell the other aircraft we had?

Q. Yes. A. No, not at that time, no.

Q. Did you have any thoughts in that connection at all? A. No.

Mr. Nelson: No further questions, your Honor.

The Court: Any cross-examination of Mr. Johnson?

Mr. Blackman: Yes.

Cross-Examination

By Mr. Blackman:

Q. Mr. Johnson, these informal get-togethers that you told us about here, so far as you were concerned, there wasn't anything that was strictly private about them, was there?

A. No, I don't remember as anything being private about them. They were just a discussion.

Q. In other words, they were open to the public if anybody wanted to come along and had come along at that time?

A. I suppose if they had walked by wherever we were, [481] they could have heard, if they wanted to, because there was nothing secret.

(Testimony of Walter L. Johnson.)

Q. With respect to these get-togethers, when the board of trustees met informally, as you described, did anyone ever raise an objection because there had not been some 24-hour notice given?

A. I don't think so. We were having so many different types of get-togethers, and on different things, that——

Q. Well, as a matter of fact, I think it has already been suggested by your counsel, you didn't even know about that requirement being in the law at that time; isn't that true?

A. No, we sure didn't.

Q. And at the time that the Finns flew the airplane off, you had no reason to believe that they didn't have the consents that you were talking about in your contract, did you?

A. I don't get that. I don't know what——

Q. You remember when Mr. Bancroft contacted the board, and suggested that the Finns wanted to take the airplane from the school district down to Los Angeles to have someone work on it?

A. Yes.

Q. Do you remember you stated that the board had gotten together at an informal meeting?

A. Yes. [482]

Q. Well, at that meeting, did you tell Mr. Bancroft, "Well, it is all right with us. Let them take the airplane off"?

A. Yes, for that purpose, that they wanted to use it for.

(Testimony of Walter L. Johnson.)

Q. So far as you personally were concerned at that time, you had no inkling that a proper consent had not been obtained from the Government, did you? A. No, we didn't.

Mr. Blackman: I have no further questions of the witness. Your Honor, I do not for a moment concede that the proper consents have not been obtained. I just put the questions in that form.

The Court: Did your board ever meet and ever exclude members of the public from attendance?

The Witness: Not at our regular meeting. Anybody can come into our regular meetings.

The Court: What about your special meetings? Did you ever exclude the public?

The Witness: No.

The Court: Affirmatively?

The Witness: No.

The Court: Ever tell anyone they couldn't come in?

The Witness: No; no. [483]

Cross-Examination

By Mr. Abbott:

Q. Mr. Johnson, did you have any conversation, and by "you," I mean the board of trustees, with the Finns on the question of whether or not they would encumber the aircraft in suit after removing it on October 26, 1951?

Mr. Nelson: Objection, your Honor, to the word "encumber." Perhaps if the witness knows what it

(Testimony of Walter L. Johnson.)

means, it would be proper, but I am not too sure I know what it means .

Q. (By Mr. Abbott:) Do you understand what I am asking you?

A. No, I was fixing to ask you.

Q. Would you understand what I meant if I said a lien? A. A what?

Q. A lien? A. A lien?

Q. How about a mortgage?

A. Yes, that is better.

Q. You know about a mortgage on personal property? A. Yes.

Q. Was there any discussion by the board of trustees with the Finns as to whether the Finns might mortgage the airplane in suit, after removing it, or before removing it from Vineland?

A. No, sir, there was never such. I never knew anything [484] about it.

Q. Did they seek your permission to mortgage it? A. No; no.

Q. Did they ask your permission to incur any debt that might be charged against the airplane of any kind?

A. You mean for the district or for——

Q. Well, to incur a personal debt, which could be charged against the airplane in suit?

A. No.

Mr. Abbott: Will the clerk please place before the witness Vineland's G.

(The document was placed before the witness.)

(Testimony of Walter L. Johnson.)

Q. (By Mr. Abbott): Have you inspected Vineland's G? A. Yes.

Q. You will note that that appears to be a bill of sale to the aircraft in suit, dated October 9, 1950.

A. Yes.

Q. Did the board of trustees at any meeting discuss with Mr. Bancroft the execution of that bill of sale for the board?

A. Well, I don't remember. For sure, I couldn't say. Offhand, no, I couldn't. I couldn't say whether we did or whether we didn't.

Q. Do you recall discussions in October, 1950, relative to sale of the hulk to the Finns? [485]

A. To the Finns—discussion with the Finns?

Q. Yes, sir.

A. Well, I remember there was—we talked of selling this thing, but at the time we were talking about it, we didn't know what we could get out of it. We was wanting to get it away from the school, and trying to get something out of it, too, but there seemed to be nobody interested. Now, just when we had our discussion with the Finns, I am not—I don't know about this.

Q. Well, the board did instruct Mr. Bancroft to transfer the hulk to the Finns sometime in the fall of 1950, did it not?

A. I am sure we did.

Q. And to execute a proper document for that purpose?

(The witness nodded in the affirmative.)

(Testimony of Walter L. Johnson.)

Q. The reporter does not pick up your nod, Mr. Johnson. If you would speak up, it will help.

A. Yes, so far as I know.

Mr. Abbott: Mr. Clerk, will you please put before the witness Government's Exhibit 12.

(The document was placed before the witness.)

Q. (By Mr. Abbott): Have you inspected Government's 12, Mr. Johnson? A. Yes.

Q. And that appears to be a bill of sale dated March [486] 28, 1951, on the hulk, does it not?

A. Gee, I wouldn't know whether it was a hulk, or what. It doesn't say "hulk" on here.

Q. Well, do you recognize the serial number that appears on the bill of sale?

A. No, sir. I wouldn't even know whether the plane had a serial number, as far as I am concerned.

Q. Well, the testimony that has come in before this time has fixed that as the bill of sale for the hulk.

A. That is what I heard, in other words, here.

Q. Yes. Now, do you know of any reason, based upon a meeting of the board of trustees, why Mr. Bancroft would give a second bill of sale on the hulk a month after the date of the execution of the agreement of February 28, 1951, Vineland's B?

A. No, sir, I don't know. I couldn't point to any particular thing about it, why.

Q. Of course, in your discussion with the Finns

(Testimony of Walter L. Johnson.)

which led to the execution of Vineland's B, the agreement of February 28, 1951, you all contemplated that the hulk would be returned to the school, didn't you?

A. You mean back in the exchange for this other plane?

Q. Yes, sir. A. Yes.

Q. Do you ever recall in any meeting authorizing, as a [487] body, Mr. Bancroft to execute a second bill of sale on March 28, 1951, or at any time after February 28?

A. Well, I couldn't say. I don't remember it. I wouldn't say we didn't, but I will say I don't remember. I am not sure.

Q. And you can't think of any reason why there could even have been an authorization for that, can you, sir?

A. Not offhand, I can't. No, I couldn't say.

Q. You expected and still expect to retain the 9-plane at Vineland as a schoolroom?

Mr. Nelson: I object to the words "9-plane."

Mr. Abbott: Yes, I will correct that.

Q. (By Mr. Abbott): The hulk?

A. The hulk, yes, sir.

Mr. Abbott: No further questions.

The Court: Any further questions of Mr. Johnson?

Mr. Nelson: No further questions.

The Court: You may step down, Mr. Johnson.

(Witness excused.)

The Court: Your next witness for Vineland School District.

Mr. Nelson: That rests our case, your Honor.

The Court: Very well. So far as International Airports is concerned?

Mr. Blackman: Yes, your Honor. I will call Mr. George [488] Batchelor to the stand at this time.

GEORGE BATCHELOR

called as a witness for the defendant International Airports, Inc., having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: George Batchelor.

The Clerk: How do you spell the Batchelor?

The Witness: B-a-t-c-h-e-l-o-r.

Direct Examination

By Mr. Blackman:

Q. Mr. Batchelor, will you state your occupation, please?

A. I am general manager of International Airports.

Q. And what is your background in the field of aviation?

A. I have been actively in aviation for over 15 years.

Q. Are you a flier? A. Yes, I am.

Q. Did you have any service experience?

A. Yes, sir.

Q. As a flier?

(Testimony of George Batchelor.)

A. Yes, I was in the Air Force.

Q. Since the end of the war, what is your background in the field of aviation? [489]

A. I have owned and operated airplanes. I operated an airline, and bought and sold, overhauled and dealt in airplanes, aircraft, and aircraft parts, all in the field of aviation.

Q. Yes. Now, when did you assume your duties as general manager of International Airports?

A. In 1953.

Q. Prior to that time were you in any way associated with International? A. Yes, sir.

Q. Did you have your own business as an aviation consultant before that time?

A. Yes, I did.

Q. As such, did you give your services or render services for International? A. Yes, sir.

Q. Did you do so in connection with the Finn transaction? A. Yes, sir.

Q. Now, International operates at Lockheed Air Terminal?

A. Lockheed Air Terminal, Burbank.

Q. And what is the general nature of their business?

A. Principally, it is an aircraft maintenance company. They buy, sell, overhaul, lease aircraft; anything in aviation. [490]

Q. Do you utilize mechanics in the shop?

A. Yes, sir.

Q. And people who are specialized in the various fields that require work done on airplanes?

(Testimony of George Batchelor.)

A. Yes.

Q. This business of yours, is that considered to be quite competitive?

A. It is very competitive.

Q. You would not call it a monopoly in any way, would you? A. No, sir.

Q. Now, drawing your attention to the aircraft which is the subject of this litigation, when did you first personally view that airplane?

A. Sometime in 1950.

Q. Where was it at that time?

A. It was on an airstrip near Bakersfield, California, at Sunset School.

Q. How did you get word of it?

A. A pilot that had previously worked for me told me that he had seen a couple of airplanes there.

Q. As a result of that you flew up there, did you? A. Yes, sir.

Q. Did you see it up there on more than one occasion? A. On two occasions. [491]

Q. How long elapsed between the first and the second time? A. Oh, perhaps six months.

Q. Did you speak to anybody at Sunset School the first time you were there? A. No, sir.

Q. How long were you on the ground at that time?

A. The first time just perhaps five or ten minutes.

Q. Did you get out of your airplane?

A. I don't think we did. There was no one around.

(Testimony of George Batchelor.)

Q. And the second——

A. (Continuing): I may have.

Q. I am sorry?

A. I don't think we did.

Q. And the second time you were there, did you speak to anyone? A. Yes, sir.

Q. To whom did you speak, if you recall?

A. Well, I know now it was Mr. Bancroft.

Q. Did you have a conversation with him at that time? A. Yes, sir.

Q. Was there anyone else present?

A. Yes, sir.

Q. Tell us who was present on the occasion.

A. Well, I can't remember the name now of the other [492] party.

Q. Someone with you? A. Yes, sir.

Q. Or someone with him?

A. Someone with me.

Q. Now, I am not too sure of the time when this took place.

A. Well, it was in the summer of 1950, and it was on a Sunday afternoon.

Q. Very well. Will you tell us, as nearly as you can recall, what was said by any of the parties?

A. Well, after we landed at the strip, Mr. Bancroft came out and met us, I believe in a jeep, and I asked him if the C-46 was for sale. He told me, no, it wasn't. And then we all went swimming.

Q. And you left the same day?

A. About two hours later.

(Testimony of George Batchelor.)

Q. Did you know Mr. Bancroft by name at that time? A. No, sir.

Q. Had you ever met him before?

A. No, sir.

Q. Did you ever know him since that time up until the time, oh, perhaps within the last two months or so? A. No.

Q. Did you ever hear about that particular aircraft [493] again, so far as you personally were concerned, up until the time that you were first contacted by one of the Finns?

A. Not that I can recall.

Q. All right. When was it, Mr. Batchelor, that you first made contact with one of the Finns?

A. In the late summer of 1951.

Q. Had you ever met them before?

A. No, sir.

Q. Did you know them by name before you were contacted by them? A. No, sir.

Q. Where did you first meet them?

A. I met one of them at Lockheed Air Terminal in Burbank, and they contacted me.

Q. And was the subject of this airplane in suit discussed? A. Yes, sir.

Q. Will you tell me, as nearly as you can recall, what was said with respect to this airplane?

A. Well, they contacted me and told me that they had bought the C-46, or bought a C-46, they owned one, and they wanted to sell it, and I asked them what they wanted for the airplane, and, as I remember it, they said $55,000.

(Testimony of George Batchelor.)

I am not sure whether this was on the same day or not. It was within one or two days of each other. And they showed [494] me some pictures of the airplane; at least, my recollection is that they showed me some pictures of the airplane, and, as I remember it, we offered them $50,000 for the airplane.

Q. Was anything consummated as a result of that offer?

A. Well, at first, we thought it was. I don't recall just now which one of the twins or the Finns that it was that I talked to. We tentatively made a deal, or I understood we did, but he did qualify it by saying that he had to talk to his brother first. And a few days later he came back and said they didn't want to sell the airplane, so nothing happened upon that.

Q. In offering the $50,000, what was your intention as far as the use of the plane is concerned at that time?

A. Well, at that time International had just completed some work in the shop, and they needed some additional work. It was primarily to keep the men working, and also to overhaul the airplane, and lease it out, and so forth.

Q. Overhauling and licensing airplanes is also a part of International's business?

A. Yes, sir, primary business.

Q. And was at that time? A. Yes, sir.

Q. Also, leasing of airplanes? A. Yes, sir.

Q. In any event, when the Finns stated that they

(Testimony of George Batchelor.)

did [495] not wish to sell the airplane to you, did you talk about any other kind of a transaction?

A. I don't believe the same day, but a day or two later they brought a list of specifications that they wanted to have the airplane brought up to, overhaul specifications, and asked us to submit a bid for doing the overhaul on the airplane.

Q. And did you do that?

A. Well, we started negotiating on it, and from that we entered into other agreements with them, whereby we agreed to overhaul the airplane and take a mortgage on it, and loan them some money. They were to furnish certain parts and equipment for the airplane with the money.

Q. Whatever they were to do and you were to do was all set forth in some written paper, was it not?

A. Yes, sir.

Q. And those written papers, those writings or documents are the same ones that have been introduced into evidence in this trial up until this point; isn't that true? A. Yes, sir.

Q. I refer now to the aircraft chattel mortgage, which is International's B; the promissory note secured by a chattel mortgage, International's C—the agreement dated August 31st between International and the Finns, which is International's Exhibit E—the lease of aircraft, dated the same date [496] International's G, and certain supplements to the lease and the agreement, which are International's H and I, respectively, and at the time those papers were

(Testimony of George Batchelor.)

signed up, did you deliver to the Finns International's check for $15,000?

A. Well, I know that it was delivered to them. I don't know that I handed it to them.

Q. Someone in the organization did?

A. Yes, sir.

Q. At your direction?

A. Yes, sir. I did all the negotiations with them.

Q. Well, now, at the time you handed them the $15,000, or, let's say International handed them the check for $15,000, had they shown you any evidence of their ownership of the airplane?

A. Yes, sir, they had.

Q. And what evidence did they show you?

A. CAA registration.

Mr. Abbott: We will object, your Honor, unless the form of the question is changed. If the question is what documents were shown, we run right into the language of the Civil Aeronautics Act. The witness started to describe the registration certificate, which, under the Act, is no evidence of title.

Mr. Blackman: Your Honor, I have no intention of running counter to the Act. I do not believe the form of the [497] question does run counter, but it calls for evidence shown this witness.

The Court: It is a conclusion as to what constitutes evidence.

Mr. Blackman: Just what they showed him.

The Court: Why don't you ask them what they showed him?

Mr. Blackman: Very well. Thank you.

(Testimony of George Batchelor.)

Q. (By Mr. Blackman): What did either of the Finns show you with respect to title of the airplane?

A. They showed me a CAA registration certificate that had been signed and returned from Washington, showing the plane to be registered in their name.

Mr. Blackman: Mr. Clerk, will you lay before the witness International's Exhibit A, please.

(The document was placed before the witness.) [498]

Q. (By Mr. Blackman): Is a certified copy of that registration certificate, which was shown you, attached to Exhibit A?

A. Yes, sir. Well, it is the same one, but this photostat has some writing on it that wasn't on the copy that I saw at the time. I don't remember it, anyway.

Q. Is more than one there, Mr. Batchelor?

A. There are three here.

Q. Do they all bear the same date?

A. No, sir. Yes, they do. Yes, they all bear the same date.

Q. Is there one there which bears no writing?

A. Well, I am sure that the one I saw is the one that had the writing added onto it later.

Q. What does that writing say?

A. It says, "Letter sent to C.A., for correction."

Q. Now, when you saw the registration for this

(Testimony of George Batchelor.)

airplane, which is a part of International's A, what did that registration certificate mean to you?

A. Well, it meant all the necessary chain of title had been submitted to C.A., and that title was clear and they issued a registration back for the application.

Q. And was there anything said about who they bought the airplane from? Not on the registration certificate. I mean in this transaction here leading up to the payment of [499] the money.

A. I believe they did state the airplane was purchased from the Vineland School.

Q. And have you had occasion to register title to airplanes before? A. Many times.

Q. And in order to obtain a registration certificate from the C.A.A., what, if anything, was true about submitting the prior bill of sale?

A. Well, you have to establish a chain of title from the last registered owner of the aircraft, in Washington, to the present owner, whoever it is going into.

Q. And if previously unregistered aircraft, what then?

A. Well, from whatever governmental agency or whatever department, you have to set up a chain of title. For example, from War Assets to whoever bought it; can go through three or four hands before it is registered the first time. If you have the bills of sale they record them and give you a clear title.

Q. And after the war had you purchased airplanes from War Assets Administration?

(Testimony of George Batchelor.)

A. Yes, sir.

Q. And registered title to it? A. Yes, sir.

Q. And operated the airplane? [500]

A. Yes, sir.

Q. In connection with your airline and otherwise? A. Yes, both.

Q. And had anyone ever questioned the registration certificates you have obtained?

A. Never before.

Q. Had you sold the airplane?

A. Yes, sir.

Q. Delivered title? A. Yes, sir.

Q. As far as you know, has anybody ever come back to you? A. Never have.

Q. Mr. Batchelor, would you ever have permitted International to loan $15,000 on this airplane if you didn't have the registration certificate which you have just referred to, part of International's Exhibit A?

Mr. Abbott: Your Honor, that is entirely self-serving and subjective.

The Court: Overruled.

The Witness: Never.

Q. (By Mr. Blackman): Now, I will ask you, Mr. Batchelor, before the time that you had the $15,000 check delivered to the Finns, did you take any other step to ascertain the condition of the title to this airplane? [501] A. Yes, sir.

Q. What did you do?

A. Well, I telephoned someone in Washington. I cannot remember who it was at this time. And

(Testimony of George Batchelor.)

asked that they check the title or the file in the C.A.A. and see that the title was clear and no liens or mortgages or encumbrances on the airplane. And they reported back to me that there wasn't any; the title was clear.

Then, after the rest of the deal was completed, why, we asked you to get a written report to that effect.

Q. So that at the time that you had International loan the money, you had the benefit of both the registration certificate and this telephone check to your source in Washington, is that correct?

A. Yes, sir.

Mr. Blackman: I have shown these documents to counsel, your Honor, and with the court's permission, may I ask that they be marked?

The Court: Yes.

Mr. Blackman: If they are marked in the order, Mr. Clerk, in which I have handed them to you, then I have a record of them.

Mr. Abbott: We do not know the order in which they have been handed to the clerk.

The Court: We will take the afternoon recess and the [502] clerk will mark them during the recess.

You are excused at this time, members of the jury, for five minutes' recess, subject to the usual admonition.

(Short recess taken.)

(Testimony of George Batchelor.)

The Court: Let the record show the jury are present.

Mr. Blackman: So stipulated.

Mr. Nelson: So stipulated.

Mr. Abbott: So stipulated.

The Court: Mr. Batchelor was under direct examination.

Mr. Blackman: Yes, sir.

Q. (By Mr. Blackman): Mr. Batchelor, are you familiar with any course of business in this industry with respect to buying and selling airplanes? A. Yes, sir.

Q. And would you say that the method that you followed, mainly, the registration certificate and this title check in Washington, is the usual method in the ordinary course of business with respect to buying and selling airplanes of this particular type?

A. Yes, sir, it is.

Q. And was this transaction, as far as International was concerned, in the ordinary course of business? A. Yes, sir.

Q. Now, did the Finns, up until the time that you had International deliver the check for $15,000, say anything to [503] you about any restrictions on the resale of the airplane by the School District?

A. No.

Q. Did you know about any restrictions on the resale, if such restrictions, in law or in fact——

A. If I had known of any I wouldn't have tried to buy it from Mr. Bancroft.

(Testimony of George Batchelor.)

Q. And this Form 65 agreement which is Plaintiff's Exhibit 1 in evidence——

Mr. Clerk, will you lay that before the witness?

Q. Up until the time this action by the Government was commenced, Mr. Batchelor, in July of 1952, had you ever seen an agreement like that, or in any way resembling that? A. No, sir.

Q. And had you ever heard of a scrap warranty clause, as such, up until that time?

A. No, sir.

Q. And when you check the file, or have somebody check the file of the C.A.A. in Washington, do you, as a businessman in this particular field, expect to find everything that relates to this particular airplane in that file?

A. Yes, sir. It is all supposed to be in one file.

Q. And did it ever enter your mind that the Government would register and at the same time claim any title to it? A. No, sir, it didn't. [504]

Mr. Abbott: This is argument.

Mr. Blackman: This is state of mind, your Honor.

The Court: I think it might be rephrased in a better form. The objection will be overruled. You may answer.

The Witness: No.

Q. (By Mr. Blackman): In other words, Mr. Batchelor, if you had known that the Government was going to claim title to this airplane, would you have permitted International Airports to loan the

(Testimony of George Batchelor.)

Finns $15,000 on the strength of the chattel mortgage on the airplane?

A. No, sir. We always considered the registration certificate as conclusive evidence of title. [505]

The Court: And if you had known the Government would or intended to make any claim, would you have done so?

The Witness: No, sir.

Q. (By Mr. Blackman): All right. Now, at the time that these papers were drawn up, Mr. Batchelor, and I am referring to International's exhibits which have been read to you earlier here, did International retain an attorney to assist them in the preparation of these papers? A. Yes, sir.

Q. And who was that? A. Yourself.

Q. Shortly after the transaction took place and International delivered the $15,000, did you ever receive a written title report respecting the condition of the title of this airplane?

A. Well, I received a copy of one that we asked you to get.

Mr. Blackman: Will the clerk lay before the witness International's Exhibit K, please?

(The document was placed before the witness.)

Q. (By Mr. Blackman): Will you identify that document, Mr. Batchelor?

A. This is a letter, dated October 15, 1951, from the Aircraft Title and Guaranty Corporation, Suite 326 Shoreham Building, Washington, D. C.,

(Testimony of George Batchelor.)

addressed to Mr. Blackman, and [506] signed by Mr. James B. Murray, president.

Q. Did you receive a copy of that letter from my office at or about the date that the letter bears?

A. I did.

Mr. Blackman: If the court please, we will offer the letter in evidence at this time.

The Court: It will be received as International's Exhibit——

Mr. Blackman: That will be K.

The Court: What is the exhibit, Mr. Clerk?

The Clerk: K. I presume that is the one he is talking about here.

The Witness: Yes, sir, it is marked K.

The Court: Are you offering all of the exhibit?

Mr. Blackman: Sir?

The Court: Or just the letter?

Mr. Blackman: We will be offering all of the exhibit, your Honor.

The Court: Received in evidence.

(The document referred to, marked Defendant International's Exhibit K, was received in evidence.)

Mr. Blackman: Mr. Clerk, may I see that exhibit, please?

(The document was handed to counsel.)

Q. (By Mr. Blackman): Mr. Batchelor, when you received [507] the carbon copy of this letter,

(Testimony of George Batchelor.)

International's Exhibit K, did you read the statement at the bottom, as follows:

> "There is no question but what the title on this aircraft is clear; otherwise the CAA would hesitate to record the same and issue a certificate in the name of the present registered owners, Messrs. Finn"?

A. Yes, sir, I did.

Q. And did the Title Company bill you for their services, or bill me and did I bill you?

A. Yes, sir, you billed us.

Mr. Blackman: Mr. Clerk, will you lay before the witness Exhibit L, please?

> (Thereupon the document was placed before the witness.)

Q. (By Mr. Blackman): Will you identify that document?

A. It is on a piece of stationery from the Aircraft Title and Guaranty Corporation, the same address, the same date, October 15, 1951, to Mr. Blackman, "Reference: Complete search and report on N111H, $10.00."

Mr. Blackman: We will offer that in evidence as International's Exhibit L.

The Court: Is there objection?

Mr. Abbott: No objection, your Honor.

Mr. Nelson: No objection.

The Court: Received in evidence. [508]

(Testimony of George Batchelor.)

(The document referred to, marked Defendant International's Exhibit L, was received in evidence.)

Q. (By Mr. Blackman): Mr. Batchelor, this type of report from that type of aircraft title company, is that the usual course of business, in so far as getting the formal report of title respecting condition of aircraft? A. Yes, sir.

Mr. Blackman: Mr. Clerk, will you lay before the witness International's Exhibit M, please?

(The document was placed before the witness.)

Q. (By Mr. Blackman): Will you identify that? A. Well, this one is blank, you know.

Q. Yes, I know.

A. This is a blank United States of America Department of Commerce, Civil Aeronautics Administration form ACA-500 in three parts.

Q. And is that the usual government form that is used in connection with a recording of title and registration of aircraft?

A. It is the only one the Government will accept.

Mr. Blackman: Mr. Clerk, may I have that Exhibit L, please? Let's see if I have the right one. Oh, it is Exhibit M.

(The document was handed to counsel.)

Q. (By Mr. Blackman): Have you, during the

(Testimony of George Batchelor.)

course of [509] your business, Mr. Batchelor, filled out a number of these? A. Yes, sir.

Q. And as a part of Exhibit M, the printed instructions thereon recite as follows:

> "New or Previously Unregistered Aircraft—The applicant for registration of a new or previously unregistered aircraft must submit proof of his ownership."

Mr. Abbott: I object, your Honor. This document is not in evidence.

Mr. Blackman: Very well. Counsel has reminded me. We will offer International's Exhibit M in evidence.

Mr. Abbott: To which we object. It is not tied up with anything here, and any recitals of procedure are hearsay.

The Court: What exhibit is it?

Mr. Blackman: It is Exhibit M.

The Court: I don't have any list to refer to. I understood that counsel would keep these up to date, and I expect that to be done daily.

Mr. Abbott: We prepared a list of exhibits, your Honor.

The Court: Daily, I said.

Mr. Abbott: I did not so understand the court, but we will do that.

The Court: In every trial I expect that.

Let me see the document, Mr. Clerk, please? [510]

(The document was handed to the Court.)

(Testimony of George Batchelor.)

The Court: Is there any dispute about it? May it be stipulated that this document is genuine in all respects in which it purports to be?

Mr. Abbott: So stipulated, your Honor.

The Court: Objection overruled. Received in evidence.

(The document referred to, marked Defendant International's Exhibit M, was received in evidence.)

Q. (By Mr. Blackman): Mr. Batchelor, one of the instructions which are attached to International's Exhibit M is as follows:

"New or Previously Unregistered Aircraft—The applicant for registration of a new or previously unregistered aircraft must submit proof of his ownership. In the case of recognized manufacturers this proof may simply take the form of a letter from an official of the company setting forth the fact of ownership by reason of fabrication of component parts. Owners of homebuilt aircraft should submit whatever evidence of ownership is in their possession, such as invoices for component parts, etc. Owners of aircraft assembled from kits should send in the bill of sale showing their purchase of the kit. Owners of war surplus aircraft, or of aircraft imported from other countries, [511] must submit a bill of sale from the seller of the aircraft."

(Testimony of George Batchelor.)

Were you aware of that at the time that you made this transaction with the Finns?

A. Yes, sir.

Q. Well, you had registered war surplus aircraft, hadn't you? A. Yes, sir.

Q. And was that the way that you went about doing it?

A. We always had to either submit—at different times War Assets Administration gave different documents. Usually, just a receipt that you purchased an airplane, and the number of it.

Q. Whatever you got, you submitted?

A. And you submitted the bill of sale, and they would record it if it was good title.

Q. Now, did you continue to rely upon the Finns' certificate of registration and the title report which is International's K in evidence, at the time that International commenced doing work on this airplane?

Do you understand the question?

A. Well, I am not sure.

Q. Well, at some time after you caused the check to be delivered to the Finns, did International start to do some work on the airplane? [512]

A. Yes, sir.

Q. And approximately when was that?

A. The latter part of October; the latter part of October, 1951.

Q. Did they receive the airplane in their possession for that purpose? A. Yes, sir.

Q. At their premises at Hangar No. 2, Lock-

(Testimony of George Batchelor.)

heed Air Terminal, Burbank? A. Yes, sir.

Q. By the way, what do you have there? A large hangar of some kind?

A. Yes, sir, an aircraft hangar.

Q. Do you have certain equipment in the hangar for the purpose of doing this work?

A. All equipment necesary to overhaul aircraft.

Q. At the time that International received possession of the airplane and commenced doing this work, did you still believe that the Finns were the owners of the airplane?

A. Yes, sir, at all times.

Q. Was that belief of yours based upon their certificate of registration and this title report that you had obtained? A. Yes, sir.

Q. Until when did International do this work on the [513] airplane?

A. Until sometime in, I believe, April, 1952.

Q. Up until that time, did anything come along to lead you to any different belief respecting the ownership of the airplane? A. No, sir.

Q. Did it ever occur to you, Mr. Batchelor, that the School District would issue a bill of sale to property if it did not own that property?

A. Never. That would be the last one you would think would.

Mr. Blackman: I have no further questions of this witness.

By the way, I believe, your Honor, for the sake of the record, it has been stipulated that the amount of work that was done by International, while it

(Testimony of George Batchelor.)

was doing work on the airplane between the dates that Mr. Batchelor has mentioned, is in the reasonable value of $10,200, no part of which has been paid.

The Court: What dates are you referring to?

Mr. Blackman: Well, I believe the first date he mentioned was October the—well, late in October.

The Court: What year?

Mr. Blackman: Of 1951; and the last date that he mentioned was April of 1952. [514]

The Court: Are the facts as stated so stipulated to, as last stated by Mr. Blackman?

Mr. Abbott: They are so stipulated by the Government.

Mr. Nelson: So stipulated.

The Court: Do the defendants Finn want to stipulate?

Mr. Charles C. Finn: Your Honor, whatever stipulation does not—if it is necessary to stipulate so as not to jeopardize the other defendants, we will so stipulate.

The Court: I don't know whether it is or not. Do you so stipulate or not?

Mr. George C. Finn: Your Honor, we will stipulate, in the interests of justice that we are going to get to in this court, we stipulate that that is the situation.

The Court: Do you concur in that statement, Charles?

Mr. Charles C. Finn: Yes, your Honor.

(Testimony of George Batchelor.)

Cross-Examination

By Mr. Abbott:

Q. Mr. Batchelor, you have described the two separate inquiries which you caused or your attorney caused to be made in Washington, District of Columbia. However, but one of those inquiries, the telephone call, occurred before you paid $15,000 to the Messrs. Finn; isn't that so?

A. Yes, sir.

Q. Who is the person you called, Mr. Batchelor?

A. I told you before, I don't remember. [515]

Q. Well, now, the court and jury don't know what you told me at the time of the deposition, so you will have to repeat it here. What was the name of the person you called?

A. I don't remember who I called.

Q. Was he some person employed by the Civil Aeronautics Administration?

A. No, sir, he wasn't.

Q. Was he a person in the same industry in which you are engaged?

A. I have a large acquaintance of people in the airline industry, and I know several attorneys in Washington, and I have a number of friends that are in and out of Washington, and quite often, if one of them is in Washington and they can be of service to our company, I will call them up and ask them to do something, if I just happen to know they are there; and, in turn, sometimes when I am

(Testimony of George Batchelor.)

in Washington, people call me and ask me to do things for them.

Now, I don't have any idea who I called three years ago, because there was nothing unusual about the call. All we wanted to know, was there any liens or encumbrances or mortgages on the airplane, or was the title clear, and they reported to us. So it was nothing unusual to remember.

Q. Your instructions to this person you called were to check all matters as to title, as they might appear on the CAA records? [516]

A. I don't know just what I told him.

Q. That was the general purport of it?

A. I told them to check, to see the title was clear and that there was no mortgages or encumbrances against it, or words to that effect.

Q. And to make that check at the Civil Aeronautics Administration? A. Yes, sir.

Mr. Abbott: At this time, your Honor, the Government offers in evidence Exhibit 7.

The Court: Is there objection?

Mr. Nelson: No objection.

Mr. Blackman: No objection.

The Court: Plaintiff's Exhibit 7 is now received in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 7, was received in evidence.)

Mr. Abbott: With the court's permission, I will read one paragraph of that exhibit.

The Court: You may.

(Testimony of George Batchelor.)

Mr. Abbott: First reading, however, a stipulation effected in the course of the proceedings on Friday, October 15, 1954, reported at page 249 of the transcript of the proceedings of that day. I am quoting from the record beginning at line 22 of the indicated page: [517]

> "We request the stipulation that that particular affidavit so identified has been on file with the public records of the Civil Aeronautics Authority from on or about April 16, 1951, continuously to the present time."

And there follow the various statements of counsel acquiescing in the stipulation.

The document I am reading is a document identified in the stipulation, namely, Plaintiff's Exhibit 7. I am reading from page 2, the next to the final paragraph on that page:

> "That said sale of this aircraft"——

which is elsewhere identified as the aircraft in suit——

> "is contingent upon the agreement in writing executed between the Vineland School District and Charles C. Finn and George C. Finn, dated February 28, 1951."

I believe it would be proper to identify the agreement described in the affidavit as Vineland's B.

Q. (By Mr. Abbott): Mr. Batchelor, you described the business in which you are engaged. Will

(Testimony of George Batchelor.)

you state to the court and jury whether it is a large or a small industry?

A. The aircraft industry?

Q. No, the industry which you define as the purchase and sale of aircraft and the repair thereof.

A. Well, our particular branch of it, that we specialize in, isn't extremely large. [518]

Q. Well, now, actually all the people in that industry in the country could be placed in a small room, could they not?

A. They could be placed in this courtroom, or the majority of them.

Q. And do you know most of them?

A. I know a large percentage of them.

Q. Isn't it customary within that industry, Mr. Batchelor, to require of a person who is selling an aircraft a chain of title of documents, that is, a group of documents by which his title is traced back to the original manufacturer of the aircraft, or the United States, as the case may be?

A. Mr. Abbott, I have bought an awful lot of airplanes, and I have sold a lot of them for our companies.

Q. I have asked you what is customary.

A. I am telling you.

Mr. Abbott: Your Honor, I ask——

The Court: Mr. Abbott, if you have an objection to make to the answer, you may make it at the conclusion of the witness' answer.

The Witness: I have never known of a sale where anyone has inquired or asked the owner of an

(Testimony of George Batchelor.)

airplane to produce a chain of title back to the original manufacturer, and I bought my first airplane in 1939.

Q. (By Mr. Abbott): Then it is your testimony there is no such custom, Mr. Batchelor? [519]

A. I have never known of any.

Q. In all of these years in which you have been operating in the aviation industry, you have become very familiar with the Civil Aeronautics Act, haven't you?

A. Well, that is a big Act.

Q. Well, you have become familiar with those portions which relate to the registration of aircraft, have you not?

A. I have registered a lot of aircraft.

Q. Well, have you become familiar——

The Court: Don't try to qualify him as a lawyer. If he were attempting to tell you what the law was, you would be objecting to it. You may ask him if he has read the statute, if you like.

Q. (By Mr. Abbott): Have you read the Civil Aeronautics Act of 1938? A. Not in full.

The Court: You can ask him what his understanding is, if you like.

Mr. Abbott: I would like to quote this on a particular aspect of the statute, if I may, your Honor.

The Court: Very well. You may ask him if he knows the statute provides so and so.

Q. (By Mr. Abbott): Do you understand, Mr. Batchelor, that the Civil Aeronautics Act of 1938 provides, in part, that registration of an aircraft by

(Testimony of George Batchelor.)

the Civil Aeronautics [520] Administration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by such person is or may be in issue?

A. I never heard that until the last, I think, few days, but I will say few months; and contrary to that, I have been advised by counsel that a registration certificate for purposes of a lien was conclusive evidence of ownership.

Q. Who so advised you?

A. Mr. Blackman advised us as to that.

Mr. Blackman: If the court please, I think that that requires an explanation. I think what the witness is probably referring to is the aircraft lien statute of the State of California, under which he operates his business, for the most part, which does provide that the federal registration certificate is to be conclusive evidence of ownership. I think counsel knows the section involved.

Mr. Abbott: Yes, and I don't agree——

The Court: There is no contention that title is required under federal law, is there?

Mr. Blackman: No.

The Court: Title, if any, resulting from a transaction in California is acquired under the law of California, is it not?

Mr. Abbott: In the first instance, your Honor, I don't agree with counsel's paraphrasing of the statute. I don't [521] know if it is material to go into that here, but, secondly, if this is property in

(Testimony of George Batchelor.)

which the United States has an interest, the property interests are those defined by the statutes and laws of the United States and not those of California.

The Court: Yes, but so far as the statutes and laws of the United States cover it, but otherwise it will be governed by the law of the state in which the transaction took place, will it not?

Mr. Abbott: Our position is that the laws and statutes of the United States do apply, and there are many cases that cover that.

The Court: That would not apply, for instance, in a transaction as between the Vineland School District and the defendants Finn, or the defendants Finn and International Airports?

Mr. Abbott: Well, they apply to the extent that a statute of the State of California is invoked to show that some person other than the owner of the property may impose a lien upon it, to the extent that a California statute could be so construed, but it could not confer the disposition of federal property or a lien on federal property.

The Court: That wasn't my question. Of course, federal law is paramount wherever federal law applies. But a transaction between the Vineland School District and the defendants Finn, or between the defendants Finn and [522] International Airports, taking place in the State of California, would be governed by the law of the State of California, would it not?

(Testimony of George Batchelor.)

Mr. Abbott: I respectfully differ, your Honor, because——

The Court: Very well. You proceed. I didn't suppose there was any question about it.

Mr. Abbott: This point has been briefed in detail by the Government, your Honor, and the brief is on file with the court.

The Court: I have seen the brief.

Q. (By Mr. Abbott): Mr. Batchelor, do you recall a conversation as follows, with Mr. George C. Finn, and I am now quoting from the transcript of the proceedings of October 28, 1954, in this cause, page 283, beginning at line 12:

> "Q. The use or title of that airplane, was that ever the subject between you and Mr. Batchelor?
>
> "A. It was a question. Mr. Batchelor said, 'Well, how did you get that airplane from the school?'
>
> "I said, 'I bought it from the school.'
>
> "He said, 'Well, how come?' He said, 'I was up looking at it a year or so ago, and they didn't want to sell it.'
>
> "'Well,' I said, 'Mr. Batchelor, that is our arrangements with the school, and I own the plane, [523] and you can check on it, and if you are satisfied, we can do business.'"

Do you recall the conversation which Mr. Finn so described, Mr. Batchelor?

(Testimony of George Batchelor.)

A. Well, I wouldn't—I recall a conversation, and that was the general gist of it. I wouldn't say that was it word for word.

Q. Well, that, in substance, is the conversation, is it not, sir? A. I would say so.

Q. Did you make the inquiry suggested by Mr. Finn in that conversation?

A. Well, we checked title, and they had the title, or, at least, that was the report we got.

Q. Do you mean that you made an inquiry of the Vineland Elementary School District?

A. Well, no, I mean, you don't check title there. There is only one place I know of, I have ever heard of, to check title, and that is Washington, on title.

Q. You made no check at Vineland, then; is that true?

A. I had been to Vineland and asked Mr. Bancroft if he wanted to sell the aircraft. He told me, "No."

Now, if he hadn't owned the aircraft, he would have said, "I don't own it, I can't sell it to you."

Now, the Finns showed me a registration certificate on [524] the airplane.

Q. Did you in the summer of 1951 cause an inquiry to be made at Vineland?

A. No, sir, I did not.

Q. Did you at any time after that make inquiry at Vineland? A. No, sir.

Q. Did the Finns show to you any document re-

(Testimony of George Batchelor.)

lating to the aircraft in suit, other than a registration certificate?

A. Well, I know, I remember very clearly the registration certificate and I believe that they showed me the bill of sale, or a copy of the bill of sale on the airplane. However, it has been some time ago, and I can't remember for sure right now.

Q. You do remember a bill of sale from the Vineland Elementary School District to the Finns?

A. Yes, sir.

Mr. Abbott: Will the clerk place before the witness International's Exhibit A, please?

(The document was placed before the witness.)

Q. (By Mr. Abbott): You are now viewing International's A, Mr. Batchelor, which is a single exhibit, consisting, however, of several documents, one of which is a bill of sale dated February 28, 1951. Is that the bill of sale which the Finns showed you? [525]

Mr. Blackman: Just a moment. I think the question assumes a fact not in evidence. I don't think the witness stated the Finns showed him a bill of sale.

The Court: Did he state that?

Mr. Abbott: I so understood, but if there is any question I will reput the inquiry, your Honor.

Q. Did the Finns show to you a bill of sale from the Vineland Elementary School District, or did they not?

A. Well, as I said before, I have a hazy recol-

(Testimony of George Batchelor.)

lection of it now, but I am not sure. Because of the time, I don't remember.

Q. Does your present review of International's Exhibit A, refresh your recollection on that point?

A. Well, I have seen this before, and I am not sure whether the Finns showed it to me or not.

Q. Did you, on the prior occasion when you saw it, note the language appearing at the very top of the document?

A. Now, wait a minute. I beg your pardon. I have not—I did not see this affidavit, if that is——

Q. No, my question is directed only to the bill of sale.

A. Well, you said the bill of sale dated February 28th, didn't you?

Q. Yes, sir.

A. This is dated April—No, I see it is notarized [526] April the 14th. February 28th—I have seen this bill of sale before, but I don't remember whether the Finns showed it to me or not. I can't positively say.

Q. Will you read the top line on the document, appearing at its very top?

A. The very top says, "Bill of Sale."

Q. No, above that, in typewritten form.

A. Well, above "Bill of Sale" I can't read because of the staple. May I take it out?

Mr. Abbott: Certainly. [527]

The Court: The clerk will assist him with it.

The Witness: Seems to be a printed line that says, "Department of Commerce, C.A.A. bill of sale."

(Testimony of George Batchelor.)

Mr. Abbott: May I approach the witness stand for a moment?

The Court: Yes.

Mr. Abbott: I will call your attention, Mr. Batchelor, to the typewritten line just below "bill of sale." "As per agreement dated 28 February, 1951."

The Witness: Yes, sir.

Q. (By Mr. Abbott): Do you recall whether those words were on the bill of sale which you saw at some earlier date and which bears a resemblance to the one you are now viewing, namely, Defendant International's Exhibit A?

A. I may be confused, Mr. Abbott. But I said that I don't remember. I have seen this before. Whether it was just recently since the case started, or not—I think maybe the Finns may have shown it to me; but now, I couldn't remember positively. But I did read it, and I did—said, "As per agreement dated February 28, 1951." But I would still read, "For and in consideration of $10.00 and other good and valuable consideration—" we hereby transfer"—the full and legal and beneficial title on the aircraft described as follows:"

Q. And in any event, on the occasion when you saw it, whenever that may have been, you did note the words you have quoted a moment ago? [528]

A. Yes.

Q. Now, isn't it a fact, sir, that whenever you purchased an aircraft from the War Assets Administration for commercial use, without restriction,

(Testimony of George Batchelor.)

that you received either a bill of sale or a document entitled "sales document"?

The Witness: Would you read that back to me, please?

(The question was read.)

The Witness: Well, No. 1, I have never before been involved in an airplane that there was any restriction on, and I think that in some instances they have various forms—the Navy had some forms. The War Assets had some called "memorandum receipts." I believe that was the title on them—that they issued when they sold aircraft.

Q. (By Mr. Abbott): Yes. But when you received a memorandum receipt in the course of purchase of an aircraft for commercial purposes from the War Assets Administration, didn't you also receive either a bill of sale or a sales document?

A. Well, I don't remember having ever received a bill of sale such as this.

Q. Well, you are now pointing to International's Exhibit A, which is a C.A.A. bill of sale?

A. That is correct.

Q. And I am not confining my question to that particular type of bill of sale. With that clarification, isn't it [529] true whenever you purchase an aircraft from the War Assets Administration for commercial use, that you received either a bill of sale or a document entitled "sales document"?

A. Well, as I said, in some cases, I think we received a document called a memorandum receipt.

Q. Yes, but——

(Testimony of George Batchelor.)

A. Which was the only document that we received. In most cases we did receive a document stating "sales agreement" or "receipt," sometimes. I know some cases where we received just a little receipt, handwritten.

Q. Did that receipt have the serial number of the aircraft in question?

A. Well, I couldn't say, now. Looking at all of them, I think it did—I would think so.

Q. You have never acquired an aircraft, taking the documents, which didn't describe a plane by the serial number, did you?

A. Not that I can remember.

Mr. Abbott: No further questions, your Honor.

Q. (By Mr. Nelson): Mr. Batchelor, you stated that you made an offer to the defendants Finn, when this aircraft was brought to your attention, of $50,000. Did you know at that time whether or not any restrictions existed against the aircraft?

A. No, sir, I didn't know of any. [530]

Q. Would this offer of $50,000 be for an aircraft which is fully equipped for commercial passenger use, and also C.A.A. certified?

A. Well, I would—well, that wasn't my intention at the time.

Q. Will you describe what your intention was at the time?

A. Well, as I said earlier, we had just finished some work in our shop, and we needed additional work at that time. The Korean War was going on,

(Testimony of George Batchelor.)

just commenced about that time, and mechanics were very hard to find, good ones. So we didn't want to have to lay any off. That was a consideration for making that large an offer.

Also, there was a market for the airplanes at that time. Now, we knew the airplane wouldn't be licensed at the time they brought it in, because we intended to do that work. But we expected the airplane to be in good condition, and to be flown into Lockheed Air Terminal. The offer was that it would be in good condition and flown into Lockheed Air Terminal. And it was a tentative offer, actually subject to inspection. I had seen the airplane before, and hadn't seen it for many months, and just on the basis of the pictures—or, at least, I remember, I think I saw pictures.

The Court: What do you mean by "licensed"?

The Witness: Well—— [531]

The Court: You mean licensed to carry passengers?

The Witness: Passenger or cargo, or—it had not type of C.A. license.

The Court: Not licensed by the Civil Aeronautics Authority for transporting persons or property?

The Witness: Yes, sir.

Q. (By Mr. Nelson): Was this type aircraft a good aircraft to use for cargo purposes at the time?

A. Very good.

Q. Could it also be adopted to passenger use at the time? A. Yes, sir.

(Testimony of George Batchelor.)

Q. And when you made your offer of $50,000 were you considering it on the basis of being a fully equipped airplane for passenger use, whether or not it received Civil Aeronautics Administration authority and certification?

The Witness: I am sorry. Would you read that, please?

(The question was read.)

The Witness: Well, I am sorry, Mr. Nelson. I don't understand your question.

Mr. Nelson: Well, I will restate the question.

Q. (By Mr. Nelson): When you considered offering $50,000 for this aircraft—you have already indicated that you didn't consider it from the standpoint of having C.A.A. certification—but did you consider it from the [532] standpoint of its being a fully-equipped commercial passenger aircraft?

A. Well, I knew the airplane wasn't going to be delivered fully equipped and fully licensed for $50,000 at that time.

Q. And you were willing to pay $50,000, sight unseen, for this aircraft, knowing that it wasn't fully equipped and knowing that it wasn't certified by the C.A.A.?

A. I don't believe I said that. I said it was still subject to inspection. And if the airplane was in good condition and would utilize the men in the shop, and keep them busy, we would pay that for it, delivered to Burbank.

(Testimony of George Batchelor.)

Q. When the aircraft was delivered to Lockheed Air Terminal, you had a good look at it, did you not? A. Yes, sir.

Q. Would your offer of $50,000 still have been made after having a visual look at the plane after its being delivered to you?

A. I don't think so.

Q. Can you give us an approximation of what you believe the aircraft to be worth after that visual inspection?

A. At the time it was delivered to Burbank?

Q. Yes.

A. Well, I would say $35,000 to $40,000.

Q. Now, you have had an opportunity since you have [533] got into this particular action to review the restrictions which the Form 65 provides, have you not? A. Yes, sir.

Q. Let us assume that you knew at the time that this aircraft was delivered to International by the Finns, that you knew of those restrictions as you do now, what would have been your offer to the Finns at that time, with those restrictions on it?

The Court: You mean assuming your restrictions to be valid and binding?

Mr. Nelson: Yes, your Honor, as they appear in the agreement.

The Witness: Absolutely nothing.

Mr. Nelson: No questions, your Honor.

The Court: Anything further? You may step down.

Mr. Blackman: Your Honor, I have just a couple of questions, please.

(Testimony of George Batchelor.)

Redirect Examination

By Mr. Blackman:

Q. Mr. Batchelor, with respect to the questions of value on the airplane in, say, February 28, 1951, in the condition in which it was at the time that you saw it at Vineland in the summer of 1950, do you have any opinion as to its value? [534]

A. On February 28, 1951?

Q. Yes.

Mr. Nelson: Your Honor, I am going to object to the opinion coming in inasmuch as the witness obviously hadn't seen the aircraft at that time. He has no idea, apparently—unless we have some foundation of what its condition was when he saw it a year and a half or so before, and when it was finally delivered to the International Airports.

The Court: Sustained.

Mr. Blackman: Well, may it be stipulated that the aircraft was in substantially the same condition on February 28, 1951, as it was in the summer of 1950?

Mr. Nelson: I would not so stipulate. I have no knowledge to that extent. If it could be so shown, I would be glad to.

Mr. Blackman: Very well, your Honor. I will not pursue the inquiry.

The Court: You may step down, Mr. Batchelor.

(Witness excused.)

Mr. Blackman: If the court please, at this time, we would like to offer into evidence International's Exhibits just marked for identification, as follows: Exhibit N, photostatic certified copy of the Superior Court claim and delivery action, No. 599,895—shall I read the whole list, your Honor? [535]

The Court: Is there objection to Exhibit N?

Mr. Nelson: No objection.

Mr. Abbott: No objection.

The Court: Received in evidence.

(The document referred to, marked Defendant International's Exhibit N, was received in evidence.)

Mr. Blackman: Exhibit O, photostatic certified copy of the affidavit for claim and delivery and return of sheriff, dated June 13, 1952, and the undertaking therein in the same action.

The Court: Is there objection?

Mr. Abbott: No objection.

Mr. Nelson: No objection.

The Court: Received in evidence.

(The document referred to, marked Defendant International's Exhibit O, was received in evidence.)

Mr. Blackman: Exhibit P, photostatic certified copy of the answer to the complaint in that action.

The Court: Is there objection?

Mr. Abbott: No objection.

Mr. Nelson: No objection.

The Court: Received in evidence.

(The document referred to, marked Defendant International's Exhibit P, was received in evidence.)

Mr. Blackman: Exhibit Q, the photostatic certified [536] copy of the complaint for foreclosure of mortgage, action No. 600,291——

The Court: Are all these in connection with the court proceedings?

Mr. Blackman: Yes, sir.

The Court: Suppose you read them all at one time.

Mr. Blackman: R, photostatic certified copy of the answer in the same action.

Exhibit S is the certified copy of the findings and conclusions, dated February 27, 1953.

The Court: Does that complete the list?

Mr. Blackman: Yes.

The Court: Any objections to Exhibits Q, R and S, International's Exhibits Q, R and S?

Mr. Nelson: No objection.

Mr. Abbott: No objection.

The Court: Received in evidence.

(The documents referred to, marked Defendant International's Exhibits Q, R and S, were received in evidence.)

Mr. Blackman: May it be stipulated that the chattel mortgage, which is International's Exhibit B, was filed for registration with the C.A.A., the Civil Aeronautics Administration on or about No-

vember 14, 1951? I believe that's the date that the filing stamp shows.

Mr. Abbott: The Government would so stipulate. [537]

Mr. Nelson: So stipulate.

The Court: That's Exhibit B?

Mr. Abbott: Exhibit B, yes, sir.

The Court: Do the defendants Finn join in all these stipulations?

Mr. George C. Finn: In the interest to justice to Mr. Blackman, yes, your Honor.

The Court: Very well.

Mr. Blackman: If the court please, we have a witness that we would like to call at this time. Mr. Robert Fabian.

ROBERT H. FABIAN

called as a witness on behalf of defendant International Airports, being first sworn, was examined and testified as follows:

The Clerk: State your name?

The Witness: Robert H. Fabian, F-a-b-i-a-n.

Direct Examination

By Mr. Blackman:

Q. Mr. Fabian, what is your occupation or profession?

A. I am attorney—I am counsel for the Bank of America, National Trust & Savings Association.

Q. And you also hold an office for the Bank of America?

(Testimony of Robert H. Fabian.)

A. Well, I am an officer. My title is [538] counsel.

Q. In connection with your duty at the bank did you ever have occasion to pass on aircraft titles?

A. Yes. I am available for consultation to the people in the installment credit loan departments who make loans and on occasion I have been consulted in connection with loans on aircraft.

Q. The bank does lend money on airplanes?

A. Yes, we do.

Q. And has the bank loaned money on large transport-type airplanes? A. Yes, we have.

Q. Has the bank loaned money on transport-type aircraft which at one time or another may have been owned by the Government?

A. Well, I couldn't answer that categorically. I assume we have.

Q. Now, does the bank follow the usual banking practices in loaning money on airplanes, as far as you know? A. I believe we do.

Q. And is it your business to know how to determine what is the aircraft title upon which the bank may safely rely? A. Yes, I think so.

Q. Will you describe what is the bank's practice in loaning money on large transport-type aircraft, please? [539]

Mr. Abbott: I object, your Honor. The bank's practice is entirely immaterial.

Mr. Blackman: If the court please, we offer this witness to show that the practice at the bank em-

(Testimony of Robert H. Fabian.)

ploys here was substantially the same as what International did in lending money on this particular aircraft; and also that the registration certificate is one of the documents upon which the bank relies.

Mr. Abbott: We object to counsel making his offer of proof under these circumstances.

The Court: The objection is overruled. The question may be answered.

The Witness: Well, we require several different things. First of all we require, one of the requirements is that the prospective borrower be the registered owner of the aircraft, as shown on the registration certificate.

Q. (By Mr. Blackman): By the "registration certificate," Mr. Fabian, do you refer to a document which is in the same general form as a document attached to International's Exhibit A?

Mr. Blackman: Mr. Clerk, will you lay that before the witness, please?

May I assist the witness, your Honor?

The Court: You may.

The Witness: Yes, the document I am looking at is part [540] of what is designated as "certificate of registration," and the owner's name is shown on that. That is one of the documents that we require. If it is an aircraft which is registered at the time the borrower applies, he must produce the registration certificate. Or he must be in a position to furnish the documents so that the aircraft can be registered in his name after the loan is made, if he is purchasing the aircraft.

(Testimony of Robert H. Fabian.)

The other things we require, of course, are an application for the credit, signed by the borrower. He must have a mortgage on the airplane and a promissory note on the airplane—promissory note for the amount of the loan. We require the Part C of this document. That is, the bill of sale from the last registered owner. We trace the title back one notch, as it were; require him to find out where—to produce evidence as to where he bought—or procured the plane.

That applies to aircraft since, registered since November, 1946. Prior to that time there was a certificate of ownership issued by the C.A.A. which was accepted in lieu of the—instead of this document; which I understand they started using in 1946.

Q. (By Mr. Blackman): Would you ever loan money, or advise the bank to loan money, on an aircraft where you were not presented the registration certificate, which is in the [541] substantial form of one of the documents in Defendant International's Exhibit A?

Mr. Abbott: If your Honor please, the witness——

The Court: What is your objection?

Mr. Abbott: We object on the grounds it is immaterial what the witness——

The Court: Sustained.

Q. (By Mr. Blackman): Mr. Fabian, until I contacted you on this matter a few days ago, would the fact that a school was in the chain of title have

(Testimony of Robert H. Fabian.)

influenced you in any way on making a loan on the aircraft, assuming the present owner had a registration certificate, bill of sale and clear title report?

Mr. Abbott: We object. What would influence the witness is immaterial.

The Court: Sustained.

Mr. Blackman: We have no further questions of the witness.

The Court: Any cross-examination of Mr. Fabian?

Mr. Nelson: No questions.

Mr. Abbott: No questions.

The Court: You may step down, Mr. Fabian.

(Witness excused.)

The Court: Next witness?

Mr. Blackman: May the witness be [542] excused?

The Court: You may be excused, Mr. Fabian.

Mr. Blackman: Your Honor, International rests at this time.

The Court: Do defendants Finn desire to offer any evidence? [543]

Mr. Charles C. Finn: We maintain the same position, your Honor.

Mr. George C. Finn: Your Honor, we have heard this trial——

The Court: It isn't over with. I just asked you because it is your turn now. You are among the defendants, and I believe we have covered all of

them except you, haven't we? We have covered the defendant Vineland School District and Bancroft, and they have rested, and the defendant International Airports have rested, and the defendant Seaboard Surety Company has disclaimed any claim of title. Now it is your turn.

Mr. George C. Finn: Your Honor, we have our original problem.

The Court: My only question is: Do you wish to offer any evidence?

Mr. George C. Finn: Your Honor, we——

The Court: Just say "Yes," or "No." Then if you want to explain anything, you may do so.

Mr. George C. Finn: No, sir.

The Court: The answer is "No"?

Mr. Charles C. Finn: Yes, sir, it is "No, sir."

The Court: Very well. If you have no evidence to offer it is time to call upon the Government for any rebuttal.

Mr. George C. Finn: May I explain, your Honor, the "no, [544] sir"?

The Court: You may.

Mr. George C. Finn: We do wish to offer evidence. We have lots of it we would like to present. We feel that justice has been carried out in the case of the Government, and these other defendants, and we feel that we have fallen a little short in our own cause, that we requested a trial by a jury, and the Government refused to go along with that request.

The Court: The court refused, because you did not comply with the rules. I don't want to discuss it

any more. You have made your point. Is there anything else you wish to say?

Mr. George C. Finn: No, sir.

The Court: Very well. The Government may call its first witness in rebuttal.

Mr. Abbott: Mr. Strube, take the stand, please.

GORDON D. STRUBE

called as a witness on behalf of the Government in rebuttal, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Gordon D. Strube, S-t-r-u-b-e. [545]

Direct Examination

By Mr. Abbott:

Q. What is your occupation, sir?

A. I am president of the American Aeronautics Corporation.

Q. How long have you held that office?

A. Since 1949.

Q. Will you, very briefly and concisely, summarize your business experience for the last 10 years, sir?

A. Well, since 1949 I have been acting as president of the American Aeronautics Corporation. Prior to that I operated my own business, known as Air Transport Supply Company, which was organized in 1947. In the year '47 back to '46, I was United States purchasing representative for some foreign airlines. From 1943 to 1949 I was in the Air Force. From 1937 to 1942, I worked for Douglas Aircraft Company.

(Testimony of Gordon D. Strube.)

Mr. Abbott: Thank you, sir.

The Court: What is the business of American Aeronautics Corporation?

The Witness: Buying and selling of aircraft and aircraft components, and overhaul of that equipment.

Q. (By Mr. Abbott): Do you, in the course of your duties as president of that corporation, have occasion to buy and sell aircraft?

A. Yes, I do.

Q. Do you, in particular, buy and sell aircraft that [546] have at some prior date been owned by the United States Government? A. Yes.

Q. Have there been a large number of such transactions in which you have directly participated?

A. A large number of airplanes have been involved.

Q. Now, have there also been a substantial number of transactions, Mr. Strube?

A. Not more than seven or eight distinct transactions.

Q. Involving aircraft that have been purchased at some remote time from the United States?

A. Yes, a quantity of 60 airplanes all told.

Q. Have you bought and sold other aircraft which were not purchased directly or remotely from the United States?

A. Well, I have bought new aircraft, but I wasn't involved in the sale of them.

Q. Now, is there a definitive industry engaged

(Testimony of Gordon D. Strube.)

in the purchase and sale and repair of aircraft, Mr. Strube? A. Well, it is a large industry, yes.

Q. Well, is it a known industry, having a number of known components, of companies engaged in the practice? A. Yes.

Q. Are you widely acquainted within that industry? A. Pretty much so, yes.

Q. Calling your attention to the summer of 1951, sir, [547] was there at that time a reputation within the industry you have defined with respect to restrictions upon sale, use or possession of aircraft which had been acquired by educational institutions from the United States? A. Yes, there was.

Q. How long prior to the summer of 1951 had that reputation existed?

Q. Well, I first became aware of it in 1947.

Q. When did you first become aware of the reputation as a reputation, rather than the fact for which it stood?

A. You mean as a general reputation?

Q. Yes, sir.

A. Well, I would have to qualify that by saying that in 1947 my company became interested in the possible purchase of aircraft such as you have described, and after having counsel investigate the possibility of purchase on several different occasions, why, we gave it up, so to speak. From that time on I suppose it became more generally known, as other people made similar attempts to ours and failed.

Mr. Blackman: Just a moment. I move that the last statement of the witness be stricken.

(Testimony of Gordon D. Strube.)

The Court: Yes, beginning with "I suppose" the answer is stricken, and the jury is instructed to disregard it.

Q. (By Mr. Abbott): Did you have occasion, prior to and during the summer of 1951, to discuss the reputation I have [548] defined with other people within the industry, sir?

A. Yes, I did.

Q. Can you estimate how many persons may have engaged in such discussions with you—persons within the industry?

A. Well, that would be a little bit difficult. I imagine it could be from 20 to 35 or 40 people.

Q. What was the reputation within the industry in the summer of 1951, with respect to restrictions upon the sale, possession or use of aircraft in the hands of schools or educational institutions, and received by them from the United States?

A. Well, in a general way, it was the recipient of these aircraft from the Government were not allowed to sell or otherwise dispose of the aircraft, except through scrapping the aircraft. And you asked for our general knowledge of it. The ideas that came to us were that if we would acquire any such aircraft, we would have to provide scrap warranties showing that we had reduced the aircraft to the basic metals, and so, since we were in the aircraft business, we weren't interested in buying such a package.

Q. Was the reputation to which you have testi-

(Testimony of Gordon D. Strube.)

fied one that was firmly established within the industry?

Mr. Blackman: Just a moment. I will object to that as calling for a conclusion of the witness.

The Court: Sustained. [549]

Q. (By Mr. Abbott): Can you state the degree of notoriety of the reputation to which you have testified?

Mr. Blackman: Objected to as vague and indefinite.

The Court: Sustained. He has said it was general, has he not? In order to answer it, he would have to say it was general.

Mr. Abbott: I think the answer is sufficient, your Honor, and I will go on.

Q. (By Mr. Abbott): Are you familiar, Mr. Strube, with customary practices within the industry with respect to checking of title at the time of the purchase or sale or hypothecation of an aircraft? A. Yes, I am.

Q. What are the customary practices, and what were the customary practices with respect to the checking of title on sale of an aircraft or lien of an aircraft in the summer of 1951?

A. Our practices, specifically, within our organization?

Q. No, the customary practices within the industry, if you know them.

A. They are pretty consistent. There is very little variation involved that is available to one. We use an aircraft title service located in Washing-

(Testimony of Gordon D. Strube.)

ton. We use that service primarily to transmit all of the documents, the chain of [550] title, and so on, to the appropriate office of the CAA to obtain a new registration or a reregistration, whichever the case might be.

We inspect the various bills of sale involved, from the origin of the first one to the one that is current, pass that on to this Title Service, and they take it from there.

The Court: You mean by your answer that the custom in the trade is to look to the documents on file with the Civil Aeronautics Administration in order to determine the title to an airplane?

The Witness: Well, sir, if we are purchasing an aircraft from an individual or from another company, we do avail ourselves of an inspection of the chain of title.

The Court: Where do you go to get them?

The Witness: Well, it all depends on how many times the airplane has changed hands.

The Court: Well, do you look in the records and the files of the Civil Aeronautics Administration? Is that where you look for the chain of title?

The Witness: No, they are not available to us.

The Court: The question asked you was not what you do, but what the industry in general does, what practice there is, if there is a practice, and I understood you to say there is.

The Witness: There is a practice that we know of, yes.

The Court: All right. What is the practice when

(Testimony of Gordon D. Strube.)

someone [551] comes in and wants to sell an airplane, or borrow money on it? What is the practice in verification of title? How do you determine whether that man owns the airplane?

The Witness: Well, the first thing we would ask him for——

The Court: Is that your practice now, you are speaking of?

The Witness: Yes, sir.

The Court: Very well.

The Witness: If a man came in the front door, and asked for an airplane, to sell an airplane, the first thing we would do is to ask for Form ACA-500.

The Court: What is that?

The Witness: That is the CAA registration form.

The Court: You would ask him to see the Civil Aeronautics Administration registration certificate?

The Witness: Yes, sir.

The Court: If he showed you that, what would you ask him for?

The Witness: That would be an indication that he possessed title to the aircraft. From that point on, having that indication, if we were interested in purchasing the aircraft, we would cause a further search to be made to determine whether there were any liens or incumbrances against the aircraft. [552]

The Court: How would you learn that?

(Testimony of Gordon D. Strube.)

The Witness: Through the Aircraft Title Service in Washington.

The Court: What does the Aircraft Title Service do?

The Witness: They would contact the CAA.

The Court: Go over to the Civil Aeronautics Administration and look through their records?

The Witness: Yes, sir.

The Court: Anything further?

Q. (By Mr. Abbott): Are there any other steps that are customarily taken in checking title of the prospective seller or mortgagor?

A. Well, if the airplanes, or, for that matter, any aircraft equipment that was formerly Government owned—if there was a suspicion or indication that any scrap warranties had ever existed against the aircraft or the equipment, we would certainly delve further into the matter of whether any waivers had been provided against that equipment—the waiver of a scrap warranty.

Q. Would it be customary to make such inquiry if it were found that a school or school district were somewhere in the chain of title?

A. We would do that, yes, sir.

Q. Would that be customary practice?

Mr. Blackman: Well, now—— [553]

The Witness: I would say yes.

Mr. Blackman: I will reserve it for cross-examination, your Honor.

Q. (By Mr. Abbott): Would the customary practice within the industry be to accept a Civil

(Testimony of Gordon D. Strube.)

Aeronautics Administration registration certificate as evidence of a waiver of a scrap warranty by the Government?

A. No, we couldn't accept it. We wouldn't feel that the CAA would have the authority to provide a waiver of scrap warranty.

Q. Now, when you testify to what you would do, are you testifying to the customary procedure, Mr. Strube?

A. Yes, from my experience, I would say yes.

Mr. Abbott: No further questions, your Honor.

Cross-Examination

By Mr. Blackman:

Q. Now, Mr. Strube, will you tell me again the name of the company of which you are an officer?

A. American Aeronautics Corporation.

Q. And where is that located?

A. Burbank, California.

Q. Are they located on the field at Lockheed Air Terminal?

A. No, we are adjacent to Lockheed. Do you want the [554-555] address?

Q. Pardon? A. Do you want the address?

Q. No, I just wanted to have some further identification. Do you have aircraft parked on the field?

A. We have one airplane at Lockheed Air Terminal and Pacific Aeromotive at the present time.

Q. What kind of an airplane? A. F-51-D.

Q. That is a fighter type airplane?

(Testimony of Gordon D. Strube.)

A. Yes, sir.

Q. That is not a transport type?

A. No, sir.

Q. A passenger or transport plane?

A. No, it is a military airplane.

Q. That is an airplane you bought from War Surplus, or someone else?

A. No, it was purchased from a foreign government.

Q. From a foreign government? A. Yes.

Q. Has your company ever owned any C-46s?

A. No.

Q. Have you personally ever owned any C-46?

A. No, I haven't.

Q. Then you have never had occasion to loan money on [556] C-46s either, have you?

Mr. Abbott: Your Honor, I object.

The Witness: We have never loaned any money on any airplane.

Mr. Abbott: As immaterial.

The Court: Mr. Abbott, either make your objection before the answer commences, or wait until after the answer is finished.

Now, what is your objection?

Mr. Abbott: We object, your Honor, on the ground that the particular model of aircraft is immaterial.

The Court: Overruled

Mr. Blackman: The answer was "No"?

The Court: Will you read the answer, please?

(The answer was read.)

(Testimony of Gordon D. Strube.)

Q. (By Mr. Blackman): So that when you tell us about the usual practice, you are telling us about what—you are not telling us about anything in which you personally have had any experience, so far as the usual practice in lending money on aircraft is concerned?

A. In lending money on airplanes?

Q. Yes. A. That is true.

Q. And when you tell us about the usual practice with respect to what you do to purchase an airplane, you are not [557] telling us about any personal experience that you ever had in purchasing an airplaine such as the C-46 here in suit, are you?

A. Such as the C-46?

Q. Yes.

A. Well, I would say there is a similarity between a C-47, and a C-54.

Q. Very well. But at this moment we are confining it to the C-46, which happens to be the airplane in suit. Have you ever had any personal experience in purchasing such an airplane?

A. No, I never have.

Q. Have you ever operated a C-46 transport type aircraft? A. No.

Q. Have you ever operated any type of aircraft for commercial purposes? A. No.

Q. Does your company do any overhaul work on aircraft? A. Yes.

Q. On any transport type aircraft?

A. Yes.

Q. On any C-46s? A. No. [558]

(Testimony of Gordon D. Strube.)

Q. You never have had a C-46 in your shop for modification, overhaul, repair, maintenance?

A. None whatsoever.

Q. Or for any purpose whatsoever; is that right?

A. That's right.

Q. When you say you participated in a large number of transactions with the Government as far as purchasing aircraft is concerned, none of those related to large transport type aircraft?

A. Well, I think I said I participated in a small number of transactions involving a large number of aircraft. I think you transposed it, but in answer to your question, I have purchased one large transport aircraft from the Government.

Q. And that was what kind? A. A C-54.

Q. I see. Did you buy that for your own account? A. Yes.

Q. From whom did you purchase it?

A. The U. S. Air Force.

Q. You bought it directly from the Government, then? A. Yes, I did.

Q. And you cleared title through the CAA?

A. That's right.

Q. You got a certificate of registration on it? [559] A. Yes.

The Court: Did you later sell that airplane?

The Witness: Yes, your Honor.

The Court: When you sold it, to whom did you sell it,—to an individual?

The Witness: Yes, sir.

The Court: Or some corporation?

The Witness: It was Allied——

(Testimony of Gordon D. Strube.)

The Court: A private concern?

The Witness: Yes, sir.

The Court: What did you do to prove to that private concern that you owned it?

The Witness: I produced the Form ACA-500.

The Court: What is that?

The Witness: That is the——

The Court. Certificate of Registration?

The Witness: ——certificate of registration.

The Court: Anything else?

The Witness: Yes, and a copy of my purchase contract from the United States Air Force.

Q. (By Mr. Blackman): Now, I believe you stated that you first became aware of school restrictions in 1947, when you attempted to purchase a school aircraft? A. Not specifically.

Q. Will you tell me what brought this to your attention? [560]

A. Well, the fact that in the conduct of my business I traveled about the United Sates, and occasionally ran into or came across an airplane that was represented to be in the possession of some non-profit organization, that it might be sold, and from the general appearance of these airplanes, the reputation of them was that they were generally in pretty good shape, so that they generated interest in the minds of many people and created a temptation to buy them, and we were not excluded from those temptations; and in our various inquiries as to who owned the aircraft, the ownership title of them, the old bugaboo of the scrap war-

(Testimony of Gordon D. Strube.)

ranty was generally in evidence, and appeared, and so we never got down actually to the detailed business of attempting to buy any of these airplanes.

Q. You never actually attempted to purchase these airplanes from the school districts who owned them?

A. That's right. It appeared futile, and we never spent any great lot of time and effort on them.

Q. But you entered into active negotiations with the school districts for them?

A. No, sir.

Q. You never got that far? A. No, sir.

Mr. Blackman: I see. [561]

The Court: Anything further?

Q. (By Mr. Blackman): One thing more: You stated that you used an Aircraft Title Service in Washington to determine the question of title and whether or not there were any liens on the airplanes? A. Yes, we did.

Q. Actually, it would be the Title Service that goes over to the CAA and checks through the file, is it not?

A. Well, in all instances that we have had, no.

Q. Well, would you yourself go to Washington and do that? A. No, I wouldn't.

Q. Well, who would do it for you?

A. In what particular instance?

Q. Well, whenever you are requesting a title search on an airplane, who would do that for you?

A. Well, I had a case—I will have to give you an example.

(Testimony of Gordon D. Strube.)

The Court: No. Who usually does it? Doesn't the Title Service do it?

The Witness: Yes, that is the usual case.

Q. (By Mr. Blackman): And that is what you rely on? A. Not in 100 per cent of the cases.

The Court: The question is whether you usually rely on them. You wouldn't pay them unless they were to go over and [562] search the records, would you?

The Witness: That is right. I will say 90 per cent of the time we do rely on them.

Mr. Blackman: Very well. No further questions.

Redirect Examination

By Mr. Abbott:

Q. Do you rely on the Title Service Company report when you know that there has been a school somewhere in the chain of title?

Mr. Blackman: Just a moment. That is the same question that I put to Mr. Fabian, and counsel objected to it, and the objection was sustained.

Mr. Abbott: The question was purely as to customary practice. I will reframe the question.

Q. (By Mr. Abbott): Is it customary practice, Mr. Strube, to rely upon the title report from Washington when you have actual knowledge that the aircraft has been owned on some prior date by a school or other non-profit institution?

Mr. Blackman: Just a minute.

The Court: Owned by a school?

(Testimony of Gordon D. Strube.)

Mr. Abbott: In the possession of a school, where the school was in the chain of title, your Honor.

The Court: In the chain of title?

Mr. Abbott: Yes, your Honor. [563]

The Court: I understood the Government contended that the school didn't own it, that the school was not in the chain of title.

Mr. Abbott: The chain of title presented by the purchaser is something by which he claims title, or claims the chain of title. If it will be more accurate, I will refer to the claimed chain of title.

The Court: You mean where there is some knowledge that the plane is war surplus, and is in the possession of some school district. Is that what you mean?

Mr. Abbott: I will adopt the court's terminology.

Mr. Blackman: To which we will object, your Honor, on the ground that the question calls for the witness to state what is the usual practice, and the witness himself has stated his lack of qualifications to give the usual practice in a case where the school has been in the chain of title.

The Court: And, also, that it has already been asked and answered?

Mr. Blackman: That it has already been asked and answered.

The Court: And is not proper redirect?

Mr. Blackman: And is not proper redirect.

The Court: Sustained.

Q. (By Mr. Abbott): Is there any difference between the procedures for checking title, the cus-

(Testimony of Gordon D. Strube.)

tomary procedure within [564] the industry, Mr. Strube, for checking title on a C-46, and that of checking title to other aircraft? A. No.

Q. Then does it make any difference at all in testifying to customary practice, whether your experience is based upon a C-46, C-47, C-54 or other aircraft? A. No, it wouldn't.

Mr. Abbott: No further questions, your Honor.

Recross-Examination

By Mr. Blackman:

Q. Then, as I understand it, Mr. Strube, you have never seen a situation where a school airplane was offered to you by a third party, who claimed to have purchased it from a school; is that right?

A. That's right.

Q. And that is the extent of your knowledge regarding customary practice where a school happens to be one of the former owners—I will strike that.

The Witness: No, it isn't.

Mr. Blackman: I will withdraw the question. No further questions.

Mr. Abbott: May the witness be permitted to answer the question last posed?

The Court: It is withdrawn. [565]

Mr. Nelson: No questions, your Honor.

The Court: You may step down, Mr. Strube, and you will be excused.

(Witness excused.)

The Court: We will take the recess, ladies and gentlemen, and it will have to be to Wednesday morning. The court has other matters to hear on Monday, and Tuesday is Election Day, so it will be necessary to continue over to Wednesday morning, and if there is no objection, that will be the order.

Again, before we separate, I must admonish you not to converse or otherwise communicate, among yourselves or with anyone else upon any subject touching the merits of this trial, and not to form or express an opinion on the case until after it has been finally submitted to you for your verdict.

You are now excused until next Wednesday morning, November 3rd, at 9:30.

(Thereupon the jury retired from the courtroom.)

The Court: Is it stipulated, gentlemen, that the jury has retired from the courtroom?

Mr. Abbott: So stipulated.

Mr. Nelson: So stipulated.

Mr. Blackman: So stipulated.

The Court: The record will so show. How much longer do you anticipate the Government will be on rebuttal?

Mr. Abbott: Direct examination on rebuttal, your Honor, [566] will take approximately one hour and a half to two hours.

The Court: Do you anticipate any sur-rebuttal?

Mr. Blackman: On the basis of what we know now, your Honor, the answer is no.

Mr. Nelson: That would be correct so far as we are concerned, too.

The Court: Very well. Then we should be able to submit the matter possibly on Wednesday? How much time do you wish to argue to the jury

Mr. Abbott: The Government suggests one hour for each party, your Honor.

Mr. Blackman: We can adhere to that limitation, your Honor. In fact, once the court defines the issues to be submitted to the jury, I really don't believe that it will take that long.

Mr. Nelson: We will certainly stay within the period, your Honor.

The Court: Perhaps we had better meet sometime on Tuesday and discuss the questions that are to be submitted to the jury, but we don't want to interfere with anyone voting.

How about 2:00 o'clock, Tuesday afternoon?

Mr. Nelson: That would be fine, your Honor. I could vote and still get here by then.

Mr. Abbott: We have this problem, your Honor, that all of us would like to prepare instructions based on the [567] interrogatories that will be submitted to the jury. If at an earlier time, perhaps Monday, it would be possible to settle the interrogatories, we would then have an opportunity to prepare and submit those instructions. [568]

The Court: I would assume you would submit proposed instructions based upon the proposed interrogatories.

Mr. Abbott: Each party is submitting interrogatories——

The Court: And you have seen them?

Mr. Abbott: ——and we have seen those filed by the School District.

The Court: I don't expect to give too many instructions to this jury. The interrogatories will speak pretty largely for themselves. If there are any rules on law on which the jury should be advised, I will be glad to instruct the jury.

Mr. Abbott: Of course, we can only speculate as to which particular interrogatories would be submitted. There is a large number of them.

The Court: If there are rules of law that would be applicable to any of them—well, I can't take this matter up Monday, gentlemen. I can take it up at 2:00 o'clock Tuesday afternoon. And you will have part of that time—of course, there is no rule against working at night, Tuesday night. And the arguments and testimony will certainly take up the day Wednesday, and probably it will be Thursday, Mr. Abbott, before we can give it to the jury.

Mr. Nelson: If the court please, on one matter; it will be extremely difficult for us to prepare either interrogatories or instructions to the jury on this matter of conversion. We have seen no amended pleading come into the action, [569] although the Government has discussed it on occasion. So am I to assume I am still with the inducement action and I will only put instructions in in that respect?

The Court: That is all that has come forward. Indications have been made there will be some motions to amend the pleadings to conform to the

proof. I am not inviting them. Of course, the court will entertain them if they are made.

Mr. Abbott: A motion of that character by the Government is now under submission, your Honor.

The Court: I haven't seen the pleading or any specifications of what particulars you wish to amend to conform to the proof, but upon the close of evidence I will hear any motions you wish to make.

Mr. Nelson: Very well, your Honor.

The Court: If we need the time, we will take whatever time is necessary to do it. But I don't see any reason why you can't prepare your instructions based upon the rules of law that will be applicable and as you contend them to be, in any event, irrespective of what interrogatories are put to the jury.

We will work it out Tuesday afternoon. I take it all of the proposals are in.

Mr. Blackman: No, your Honor. Ours are not in. However, to assist counsel, the only three that we intend to [570] submit are those relating to notice on the $15,000, notice on the work that was done thereafter and waiver. Those are the three that we intend to submit.

The Court: Very well. And you serve and file them Monday.

Mr. Blackman: Yes.

The Court: Not later than 12:00 o'clock Monday.

Anything further?

Mr. Abbott: Nothing further, your Honor.

The Court: The trial will be recessed until Wednesday morning at 9:30.

(Whereupon at 5:15 o'clock p.m. a recess was taken until 9:30 o'clock a.m., Wednesday, November 4, 1954.) [571]

November 2, 1954; 9:30 A.M.

The Court: Ex parte matters? Case on trial.

Is it stipulated, gentlemen, that the jury is present?

Mr. Abbott: So stipulated.

Mr. Nelson: So stipulated.

Mr. Blackman: So stipulated.

The Court: The record will so show. You may call the first witness in rebuttal.

Mr. Abbott: Mr. Edward Bradley.

EDWARD G. BRADLEY

called as a witness by and on behalf of the plaintiff in rebuttal, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Edward G. Bradley.

The Clerk: Be seated, please.

Direct Examination

By Mr. Abbott:

Q. What is your occupation, Mr. Bradley?

A. I am assistant chief, Real Property Division—Real Property Section, Surplus Property Division, Department of Health, Education and Welfare.